

The
Supreme Court
and its
Appellate Power
under the
Constitution

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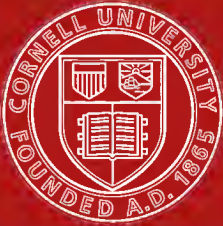
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**THE SUPREME COURT OF THE UNITED
STATES AND ITS APPELLATE
POWER UNDER THE
CONSTITUTION.**

THE
SUPREME COURT

OF THE
UNITED STATES.

**WITH A REVIEW OF CERTAIN DECISIONS RELATING
TO ITS APPELLATE POWER UNDER
THE CONSTITUTION**

BY
EDWIN COUNTRYMAN



ALBANY, N. Y.
MATTHEW BENDER & COMPANY
1918

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CONTENTS

Preface	pp. v-vi
Introduction	pp. vii-xxi
CHAPTER I. Origin and organization.—The last reorganization a coercive measure to secure judicial approval of legal tender provision.—Similar legislation to prevent exercise of jurisdiction by the court.—Equally indecorous and unwarranted treatment of the court by the executive in refusing to execute its final judgment overruling the decision of a State tribunal.—The legislation of 1801, repealed in 1802, a partisan and reprehensible effort to create additional judges and courts before they were needed.—Senatorial condemnation of President's Jackson in 1834 a violent and unjustifiable proceeding.—The Dred Scott case an example of judicial subservience to political influence.—Partisanship predominant influence with senators in appointment of judges.—Senatorial partisanship on trial of impeachment of President Johnson.—Relentless partisanship of electoral commission.—Judiciary proper subject of criticism.—Partisan motives the prevailing rule in executive appointments.—Many able and several pre-eminent judges in the court.—Essential conditions of judicial independence.—Existing defects in the organization of the court and amendments suggested to the Constitution	pp. 1-63
CHAPTER II. Jurisdiction.—The jurisdiction of the Supreme Court is granted and in general terms described in the Constitution.—No earlier example of such a tribunal.—The court final arbiter of constitutional questions.—The Constitution original and only source and authority of the judicial power	pp. 64-77
CHAPTER III. Jurisdiction, continued.—The court cannot be deprived by legislation of its appellate jurisdiction	pp. 78-119
CHAPTER IV. Jurisdiction, continued.—The constitutional jurisdiction of the Supreme Court extends over all the territory of the United States	pp. 120-190
CHAPTER V. Jurisdiction, continued.—The judicial power as extended by the organic law comprehends jurisdiction of all forensic controversies involving the validity of executive and legislative acts under the Constitution	pp. 191-251
CHAPTER VI. Jurisdiction, continued.—The judicial power extends to and includes all questions which become the subjects of litigation, involving executive or legislative acts under the constitutional provision guaranteeing to the several States a Republican form of government	pp. 252-267

PREFACE.

This critique is not a general dissertation upon the judicial interpretation of the Constitution. The author is too much in sympathy and accord with the salient features of that interpretation in its usual application to the provisions of our organic law, to indulge in any general criticism. There are, however, a few important decisions of the court of last resort, in which it has declined to exercise its appellate jurisdiction; and as this special interpretation of the judicial power is equivalent to a refusal of the court in many cases to act as a check upon the official action of the executive and Congress, this work is principally composed of a series of strictures upon those particular decisions. That the nature and gravity of the conclusions involved in some of these decisions are startling in their possible consequences, must be quite apparent when an eminent professor of Columbia University deems himself justified in announcing in a public address as their legitimate result that Congress has the *power* under the Constitution "to wipe away the appellate powers" of the Supreme Court "whenever such action may be deemed expedient." The object of this critical review is to show that while there is too much truth in the charge that such decisions have been made, there is no foundation for the decisions in the Constitution.

I am under special obligation to Pierre E. DuBois, Esq., for the personal interest he has shown in the work and the important suggestions he has offered in the course of its development. I am also indebted to Thomas F. McDermott,

Esq., for his assistance in preparing the list of authorities cited, and the general index. And I must not omit to mention the courtesy of The Green Bag and also of the American Law Review, in permitting the extensive use herein of articles previously written by the author and published in those periodicals.

INTRODUCTION.

It was not a pleasurable undertaking to single out and critically comment upon certain decisions forming a small part of the official work performed by the greatest judicial tribunal the world has ever known. As a busy practitioner at the bar for more than half a century the author had become imbued with a genuine regard and admiration for the Court, to whose decisions upon questions arising under the Constitution and laws of the United States he had habitually referred as the highest authority for the final solution of all interpretative doubts and difficulties.

When, however, in later years, he discerned the Republic drifting far away from its constitutional moorings, and entering into active competition with European and Asiatic monarchies for the subjugation of foreign lands; when he beheld Congress formally investing the President with arbitrary power over the conquered territory, and his subsequent exercise therein of autocratic rule until Congress, substituting itself in his place, assumed directly the power of unrestricted legislation over the new dependencies, and ruled them with a more despotic sway than England ever claimed or exercised over her crown colonies; when he perceived that the executive and legislative powers were deliberately ignoring the National policy of more than a hundred years and were pertinaciously vaunting their success in listing the Republic among "world powers,"—a diplomatic euphemism for what is really international piracy—he began to enquire how the Nation could have been borne so far beyond the limita-

tions of the law of its creation, and to seek the cause of this plain departure from republican principles and practices. He found to his amazement that the refusal of the Supreme Court to exercise its constitutional jurisdiction as the governmental balance in our system of National administration was largely, if not principally, responsible for this wide divergence of the Union of the States from its regular course of action as prescribed in the organic law.

The extension of the judicial power to include "all cases in law and equity arising under the Constitution" and the laws and treaties of the United States, appeared to be a clear and comprehensive grant of jurisdiction to the court over all illegal acts and proceedings of the executive and Congress, which should become involved in litigation between parties in interest who were affected or injured by the unwarrantable course of procedure. The evident purpose of the extension beyond the limitations of judicial power in vogue prior to the Constitution was to enable the court to exercise an efficient and effective restraint upon the other co-ordinate powers of the Government. The experience of other nations had clearly shown that the natural tendency and the usual result of a sole reliance upon the action of executive or legislative powers in governmental affairs was the gradual assumption and exercise of undue authority, thus increasing by degrees their influence and control until by constantly recurring usage such encroachments were claimed and eventually recognized as a normal development of lawful supremacy. The framers of the Constitution assumed that this illegitimate tendency of the executive and the legislature could be checked and a practical remedy be afforded by creating a co-ordinate judicial tribunal and investing it with special jurisdiction to review in proper suits or actions the constitutionality of the official acts of the General Government.

Unfortunately the Supreme Court has declined to exercise

in all its plentitude this important jurisdiction. The executive and Congress have been allowed to act in plain violation of constitutional restraints, not only in entering upon a career of ruthless conquests, but in pursuing arbitrary and capricious methods of governing the territory thus acquired.

This constitutional jurisdiction of the court, however, has been constantly exercised in overruling ordinary legislation; and in view of the success which has attended this course in holding such acts of the executive and Congress to be contrary to the limitations imposed or in excess of the powers conferred by the Constitution, it may well be claimed that if the court had maintained in all respects its jurisdiction intact according to the terms of the extension of the judicial power, a similar result would have followed from such judicial action, and the country would have been spared the scandal and dishonor of reducing innocent and helpless people to its subjection and autocratic domination.

The astonishment of the author was not abated upon ascertaining that the court had acquiesced in the effective operation of an act of Congress practically depriving it of all the appellate jurisdiction conferred by the Constitution; and treating the granting clause in that instrument as vesting in itself as the National legislature plenary control over the appellate power of the court. This important innovation was accomplished by assuming, and acting on the assumption, that a power to make exceptions to a general rule was equivalent to unlimited authority to abrogate the rule itself and exercise in lieu thereof the right to reconstruct and rearrange and distribute *de novo* the appellate jurisdiction. This view was embodied in the judiciary act of 1789, which instead of merely making exceptions prescribed a new rule for the exercise of the appellate jurisdiction of the court, essentially different in terms and substance from the provisions of the Constitution. The effect of this vital change without a pro-

test from the court as the event proved in the Civil War, was to render this great tribunal subservient to the political branches of the Government to such an extent that Congress did not hesitate to dictate in the most offensive manner its control of the exercise of the appellate power, by repealing a statutory provision under which the court was about to hear and determine an important legal controversy; and the court, instead of asserting the higher authority of the Constitution in favor of its jurisdiction and its co-ordinate existence and recognition as such in that instrument, meekly dismissed the appeal.

There are other instances of apparent reluctance on the part of the Court to assert its co-ordinate independence, especially during and for several years after the Civil War. Every effort then made to test the constitutionality of the reconstruction acts of Congress was promptly and peremptorily "nipped in the bud;" the court refusing to entertain an action against the President, or to determine the merits of a case against the Secretary of War and his subordinates involving the validity of those acts. A hearing upon the merits would necessarily have resulted in holding them void, as no lawyer or jurist would hesitate to pronounce statutory provisions passed after the war closed, which substituted throughout the South military for civil government and military commissions for the civil courts, bald infractions of the fundamental law. It may be conceded that in the confusion and disorder of that direful crisis the fervor of patriotism was influential if not controlling in these decisions. Indeed, this seems to be admitted by one of the judges who heard and decided those cases. He said, in writing the opinion of the court in a later case, that

"in the course of this war persons hostile to the Union did not hesitate to invoke the powers of the courts for their protection as citizens, in order to cripple the exercise of the authority neces-

sary to put down the rebellion ; yet no improper interference with the exercise of that authority was permitted or attempted by the courts.”¹

This frank admission that suits brought to test the validity of acts of Congress under the Constitution were decided on the theory that if successful they might “interfere with the authority necessary to put down the rebellion” is certainly worthy of record for serious reflection and future reference. It is an old adage that hard cases make bad law ; but these decisions have nevertheless been cited in later cases with undisguised approval.

Another aspect of this singular inclination or tendency of the court to circumscribe as much as possible the limits of its jurisdiction, is the refusal to entertain suits against the Government without its consent, despite the constitutional provision extending it “to controversies to which the United States is a party.” This immunity has also latterly been given by the decisions to the President and the members of his cabinet, who certainly as citizens ought to be amenable to the law, and as officers are merely public servants under our republican system of government. The judicial recognition of these official privileges is the more inexplicable from the fact that such unequivocal exemptions are not conceded to the representatives of the executive powers of Great Britain and other constitutional monarchies. Nor were they recognized or enforced in the early days of the Republic.

It is sometimes urged in support of decisions overruling or modifying the conclusions reached in earlier cases that the language of the Constitution is susceptible of different meanings in later eras or epochs from its actual import in the first instance, and is therefore subject from time to time

1. U. S. v. Lee, 106 U. S. 222.

to variable interpretations to meet these changes in the significance of the words used in the written instrument. It is a trite remark in general and in legal literature that the Constitution on account of its wonderful inherent power of expansion and adaptation has kept pace with the marvelous growth of the nation, and is destined to do so by a continual process of growth in the future as in the past.

The English Constitution, if it be a constitution, which it clearly is not in the American sense, may with more propriety be referred to as a growth. It consists of a congeries of documents, granted or adopted from time to time, running through a period of seven hundred years, commencing with *magna carta*, and followed by the petition of right and various Acts of Parliament. It is still incomplete, as a struggle long pending is yet undecided to deprive the House of Lords of its co-ordinate power with the Commons in all political or constructive legislation. The practical result of this tedious process of growth is that the House of Commons, which was at the outset the weakest branch of the Government, has now become the most powerful.

But our Constitution is complete in itself, to which no addition can be made and from which no detraction can be taken, except by a specific amendment pursuant to a special provision of that instrument. A written document cannot grow in the sense of undergoing from age to age radical or vital alterations of the meaning of its terms and provisions to meet new exigencies. Its phraseology, however, may be general and even broad enough to include new conditions and emergencies not anticipated by its authors, but that was the evident object of those who framed the Constitution. In the language of Mr. Justice Brewer, in an opinion of the court,¹

1. *South Carolina v. U. S.*, 199 U. S. 448-9.

“Two propositions in our constitutional jurisprudence are no longer debatable. One is that the National Government is one of enumerated powers, and the other that a power enumerated and delegated by the Constitution to Congress is comprehensive and complete, without other limitations than those found in the Constitution itself. The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now. Being a grant of powers to a government its language is general, and as changes come in social and political life it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner changes the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made are still within them, and those things not within them remain still excluded.” And quoting from Chief Justice Taney, in an earlier case, he added, that “any other rule of construction would abrogate the judicial character of this court, and make it the mere reflex of the popular opinion or passion of the day.”

Nor is it justifiable to indulge too freely in the application of what has been termed a “rule of reason” in the interpretation of the Constitution. The elasticity of its provisions to endure the strain of liberal interpretation is indeed exceptional if not extraordinary, but when entirely new and even contradictory additions are by forced construction fastened to the text, all sense of proportion is disregarded, and the method thus resorted to practically results in unreason. A departure from the usual meaning of words and phrases or of language in general in search of a rule of reason is likely to terminate, unconsciously perhaps, in the adoption of the preconceived personal views of what ought to be rather than of what is the law. In the last analysis it is simply the exercise of an undefined and indeterminate judicial discretion in reaching any conclusion desired.

Many governmental acts may be mentioned as indicative of what is called the growth of the Constitution, but these precedents are frequently plain violations of the organic law, and are not controlling over the judiciary. They are only abnormal outgrowths upon the main body of the fundamental law, and if not removed by judicial procedure will eventually infuse the virus of imperialism into our constitutional form of government.

Many persons deprecate criticisms of the court, and some of its members have occasionally given expression to their disquietude and regret that discontent and disapproval of its proceedings should exist among any considerable portion of the people. But the court itself is not entirely free, especially in recent years, from responsibility for much of this critical examination of its decisions. In many important cases there has been a strong dissent of one-third and not infrequently of four-ninths of its members; and it has not escaped observation that the minority members in those instances have not acquiesced in the final decisions, but have subsequently persisted in similar cases in renewing their dissent. And whenever a change of personnel in the court has occurred resulting in the minority becoming the majority, the original dissentients remaining have not hesitated with the aid of new members to reconsider and overrule the prior decisions.

A typical illustration of this tendency of the court is afforded by the recent case of *The Standard Oil Company versus United States*,¹ which overruled the decisions against the *Trans-Missouri Freight Association* and *The Joint Traffic Association*.² The vital question presented in the latter cases cited was whether the prohibition contained in the Act of Congress "to protect trade and commerce against unlaw-

1. 221 U. S. 1.

2. 166 U. S. 290, 171 U. S. 505.

ful restraints and monopolies" extended to all contracts of the associations in actual restraint of trade or merely to those in unreasonable restraint of trade according to the rules of the common law. The decision, as interpreted in the opinion, in the *Trans-Missouri* case, was made in 1896, and the opinion of the court gave a literal interpretation to the statute, applying it to an actual restraint of commerce, and was concurred in by five justices, four dissenting. The *Joint Traffic* case was decided two years later, reaffirming the first decision, five justices concurring again and three dissenting, the remaining justice taking no part. The court decided that the suits of the Government could be maintained without proof that "the agreement was entered into for the purpose of * * * maintaining rates above what was reasonable." The dissenting opinion assumed and insisted that the agreement was reasonable in that respect, and therefore valid. Both cases were elaborately argued by the leaders of the bar and thoroughly discussed in the prevailing and dissenting opinions, so that the natural inference of the profession was that the interpretation of the statute was firmly and permanently established. The same question, however, came before the court again in 1910, in the case against the *Standard Oil Company*, one of the five justices composing the majority in the earlier cases having resigned and three others having died in the meantime, when the majority of the court, consisting of three former dissentients and new members, reconsidered and distinctly overruled the former decisions and held that the statute only prohibited contracts providing for an unreasonable restraint of trade. The opinion of the court was written by the author of the dissenting opinion in the former cases, and contained such a severe and relentless criticism of the prior decisions as to evoke an earnest protest from the only surviving member who had concurred in making those decisions.

There are two special and important reasons why the court should not hesitate to exercise its ample and entire jurisdiction in all cases arising under the Federal Constitution: (1) To preclude, if possible, the stupendous financial interests of the country from combining to control the policy of the Government in the management of its fiscal resources for the ultimate purpose of obtaining the principal or exclusive use and benefit of governmental power and patronage in their own behalf. (2) To restrain and repress the equally unlawful and dangerous coalition of ambitious political agitators from inciting and misleading the populace and inducing it to engage in unconstitutional means and measures, not only to embarrass and thwart governmental policies, but even to overturn all representative Government.

1. To the former we may ascribe the potent influence of the great financiers, whose boundless accumulations of wealth are no longer limited to the familiar figures of millions of dollars. Those well known numerals are quite sufficient for all legitimate purposes of industry and commerce, and even of dealings between nations. But these vast accumulations have recently risen to the higher numerical symbol of billions of dollars, which are actually employed through the voluntary associations of individuals or the mutual interlocking directorates of corporations in the management and manipulation of financial schemes and operations enabling the combinations to override competition and practically control in their own interest the commercial and to a not inconsiderable extent the financial policy of the country. But even this monopoly of trade and commerce at home does not satiate the greed of these abnormal prodigies of finance, who aspire to a similar rule over other countries. They accordingly endeavor to induce and frequently exercise a strong if not a controlling influence in promoting aggressive governmental measures of foreign intervention, with the intention

of ultimately imposing their power upon weak or helpless nations. This object is sometimes accomplished by prevailing upon them, with or without diplomatic assistance, to accept large loans of money secured upon their natural resources. Failing, however, in procuring actual intervention, the same result may follow from persistent negotiations and professedly benevolent interference and assistance in their fiscal affairs as well as by purchasing from needy rulers valuable concessions of exclusive rights to exploit undeveloped mines, oil-lands, forests or other indigenous assets of a country, thus obtaining complete control of its principal sources of wealth and exploiting them until they are exhausted.

These powerful special interests can only be repressed at home by unrelenting governmental prosecutions; and this course has recently been pursued with partial success, and has resulted in holding them to some extent in check. But these repressions of their operations at home usually tend to increase and quicken their efforts abroad and to make them more persistent and effective in machinations to embroil their own Government with other nations. Their invariable remedy for the difficulties and complications arising from prosecutions at home and opposition to obtaining or protecting concessions abroad is estrangement and even war between the nations; so that new desirable territory may, within the modern doctrine of some judicial opinions, be annexed to but not incorporated in the United States. They may be and in the end frequently are able to enlist the political departments of the Government in their behalf, and do not fear, under the present drift of judicial decisions concerning the power of Congress in new territory, the interference of the courts. It therefore behooves the court of last resort to reconsider the relations of newly acquired territory to the Union of the States, and to exercise its jurisdiction in extending the shield of the Constitution and laws over all

such acquisitions. A decision of this character would instantly dispel all desire and put an end to efforts of the special interests for the annexation of more territory. They do not want the territorial inhabitants to become members of the Union, and as their fellow citizens entitled to equal protection with themselves; and if these financiers are not permitted to exploit and appropriate the internal and material wealth of the desired territory, their motive for its acquisition will no longer exist. If, therefore, no prior opportunity occurs in a given case to enable the court to intervene and restrain or suppress these unreasonable and unpatriotic leaders in finance from such improper financial projects abroad or active intermeddling with our foreign affairs, the proper judicial exercise of its constitutional jurisdiction in recognizing and enforcing the supremacy of the Constitution and laws of the United States over the new acquisitions would alone practically accomplish these desired results.

2. There is another class composed of uneasy and discontented persons in the community, forming a large element of the population in many of the States, who are ever ready to embark in any movement for a change in the management of public affairs. These persons as a rule have no definite conceptions or settled convictions concerning the course to be pursued in governmental matters, but they are thoroughly imbued with a vague impression that any change is an improvement, and should therefore be accepted as evidence of progress. The proposed change may relate to public offices or to the official methods of office holders; or it may refer to modes of legislation, or to the course of judicial proceedings, or even to the republican form of government as embodied in the Constitution. If the particular proposal of change should involve an increase of power or authority of the people at large, as their right to a referendum to pass upon the adoption of legislation or to review judicial decis-

ions, the approval of the populace is quite sure at first to follow, not only in due form but with unmeasured enthusiasm and delight.

Leaders, however, are requisite to develop and guide this mass of inefficiency to practical results; and in the last presidential election these leaders were in waiting, as they had anticipated and contributed to the conditions of discontent which were preliminary and essential to the creation of the desired opportunity for a great popular demonstration. These leaders were elderly men, functionaries and ex-functionaries, of more or less experience in governmental affairs, who in the whirligig of politics had been dismissed, or were fearing dismissal, from leadership in their old organizations, but were not inclined to retire from political life; and, moreover, they were men, who, in order to ingratiate themselves with their new associates, had no hesitation in repudiating the political faiths, by means of which, as members of the old parties, they had mounted to public prominence. There were also many sincere men of simple lives, and some ambitious persons, in the various professions and professorships, predisposed to listen to sentimental effusions, but quite impracticable in dealing with the relations of real life, who endorsed without question the wildest suggestions of the actual leader of the movement, the adoption of which would result in the rejection and repeal of the vital principles of our constitutional form of Government.

What are these primary principles? The sovereignty of the people, expressed at the polls, in the selection of an executive and of senators and representatives in Congress, and indirectly of judges and other public officers. The people adopted the Constitution as the supreme law, and are therefore equally subordinate with all public officers to its provisions; and the people, as well as the several governmental departments, are subject to all the limitations of their power,

and to all the regulations of their official action, contained in that instrument. The people are accordingly limited in their sovereignty, and are required to rule only through their official representatives; so that in the absence of constitutional amendments authorizing the particular course of action, any other proceeding is unauthorized and revolutionary. The court, moreover, is bound to enforce these limitations against all transgressors of the fundamental law. If the court does not fail to exercise its jurisdiction there is no danger that revolutionary doctrines can seriously hamper or impede the astonishing growth, progress and prosperity which the country has sustained under its representative institutions since 1789. That jurisdiction extends to all cases arising under the Constitution and laws of the United States. The Constitution, indeed, imposes upon the Federal Government the special duty of "guaranteeing to every State in the Union a republican form of government." It is, therefore, incumbent on the court to entertain jurisdiction of any suit at law or in equity to enforce this guaranty. If this duty is strictly performed, all efforts to undermine the Constitution by the adoption in any State of the so-called initiative, referendum or recall, by which its representative institutions may be converted into an unbridled democracy, will be subdued at the outset. If on the contrary the court declines to exercise its jurisdiction, the populace in one or more States may be induced by influential demagogues to adopt these preposterous methods of government; and such untoward examples may be followed in other States until three-fourths of all the States have done likewise. In the meantime these precedents will be pressed by members from the revolutionary States in the two Houses of Congress, upon the Federal Government, and the Nation at large will be involved for a generation in the turmoil of incendiary agitation and possibly of local riots and serious disturbances before the misapprehen-

sions of the populace can be corrected and the popular passions appeased. To prevent such a calamity the court must become in the exercise of its jurisdiction, as intended by the Constitution, the actual balance wheel in the administration of our National affairs.

CHAPTER I.

ORIGIN AND ORGANIZATION.

The Supreme Court of the United States is unique in its origin and jurisdiction. It affords the first historical example of a judicial tribunal coeval and co-ordinate with the executive and legislative powers in a Nation. The court was created by the Constitution as a component part of our republican form of Government. It was intended to be as independent in its sphere as either of the other governmental departments, and as indestructible as the Union of the States.

An efficient and independent judiciary was regarded by the framers of the Constitution as indispensable to the successful operation of the new Government. There was, however, no precedent to guide them in making provision for a tribunal of such extraordinary powers. And one of their most perplexing problems was to devise a method of insuring a selection of its constituent members who should possess the requisite ability, resolution and self-reliance to enable the court to maintain its freedom and independence.

The early colonists and their descendants who fought for independence were familiar with the history of the English judiciary prior to as well as after the revolution of 1688. They were well aware of the wrongs endured by their ancestors through the exercise of governmental influence over the decisions of the courts, especially in cases involving even incidentally the prerogatives of the Crown or the authority of

Parliament. They did not fail to bear in mind that after the death of Cromwell and the restoration of the monarchy, "when the violence of party spirit was at its height, and when one or the other faction had an object to attain, no hesitation was exhibited in removing the judges who were deemed too honest and conscientious, and in raising others to the judgment seat who were cringing candidates for popular applause or courtly favor, and who were likely to prove supple instruments of the ruling powers."¹ They appreciated the danger to common right of allowing the judges to become exposed under any form of government to the insidious interposition or ascendancy of the depositaries of the executive or of the legislative power. They were equally concerned to shield the court from the occasional eruptions of popular excitement and passion, likely to be aroused and fanned into flame by reckless and irresponsible agitation upon fleeting and incidental questions of the day.

Various methods were accordingly proposed and considered in the constitutional Convention to prevent the control of the judiciary or even interference with it by the populace or by the other governmental departments. Repeated efforts to confer the sole power of appointing the judges, as well as other public officers, upon the executive, and again upon the Senate, or the House of Representatives, or both Houses of Congress, were successively defeated. But it was believed by a majority of the members that if joint action of the President and Senate were required in making the judicial appointments, accompanied by restrictions upon the power of interfering with the compensation of the judges and of removing them from office, their independence would be secured. This plan was finally adopted, notwithstanding the urgent protest of several members, that as the President was merely to nominate there was no real responsibility, and as

1. Foss' *Lives of the Judges of England*, 4.

the Senate was to concur there was no reasonable certainty of obtaining the desired result. The point of this protest, in the light of the prior discussion, was that the President would be relieved of his proper responsibility by being compelled to consult with and defer to the preferences of a body composed of numerous members, while the senators would have no personal sense of accountability for their collective action. But there is in the record of the proceedings of the Convention no intimation that any one anticipated concerted action on the part of the executive and Congress to coerce the court by changing its organization in order to obtain its sanction of measures contemplated or approved by those departments, when assailed in subsequent legal proceedings as in contravention of the Constitution.

The plan adopted required the judges to be "nominated" and "appointed" by the President "with the advice and consent of the Senate." They were authorized to "hold their offices during good behavior," and were protected from removal otherwise than by impeachment and conviction of "high crimes and misdemeanors." And a special provision was superadded that their compensation could not be diminished "during their continuance in office."

These provisions reveal the solicitude of the members of the Convention to obtain, if possible, a competent and independent judiciary. The President, senators and representatives are chosen for comparatively short official terms, and, as the more direct and immediate deputies of the people, are exposed to a greater extent to the passing influences of public opinion or to the sudden manifestations of popular caprice. But the members of the court, holding their positions for life and exercising their functions in the serene atmosphere of forensic discussion and judicial exposition, devote themselves exclusively to the administration of justice in accordance with their understanding of the Constitution and

the laws. Their mode of selection and their immunity from invasion of their special prerogatives were designed to assure their freedom from all restraint, and secure the requisite qualifications for the exercise of their judicial functions beyond the reach of external influence or interference. They are indeed so far removed from the capricious impulses and precipitate conclusions of the passing moment, that other things being equal they are far better qualified than the executive or the legislature to interpret and explain equivocal or indefinite constitutional provisions.

The organization of the court was completed by the enactment of the judiciary act of 1789 and the appointment of a chief justice and five associate justices, four of whom were a quorum. The associate justices were given precedence according to the dates of their commissions, or when their commissions bore the same date, according to their ages.¹ Another associate justice was added to the court by an act of Congress in 1807; and an increase of two more was made by another act in 1837, six of whom were a quorum. By a later act, passed in 1863,² a ninth associate justice was authorized and subsequently appointed, increasing the members to ten, the highest number of which the court has ever been composed.

Three years afterward³ it was deemed desirable to reduce the number of associate justices; and to accomplish this purpose a statute was enacted declaring "that no vacancy in the office of associate justice of the Supreme Court shall be filled by appointment until the number of associate justices shall

1. An act of Congress, passed February 13, 1801, provided, "that from and after the next vacancy that shall happen in the court, it shall consist of five justices only, that is to say, of one chief justice and four associate justices." But before the vacancy occurred this statute was repealed by another act of Congress, passed March 8, 1802.

2. 5 Carey's Laws of U. S. 230-257; 6 Id. 15-17.

3. 1866.

be reduced to six; and thereafter the Supreme Court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum." One vacancy had occurred before this act took effect, which remained unfilled, and another associate justice died shortly afterward, reducing the number to eight members of the court. While it was thus organized a case came before it, involving the constitutionality of two acts of Congress, one passed in 1862, the other in 1863, making national notes or bills of credit legal tender in the payment of debts. The case was argued in 1867 and re-argued in 1868, and decided adversely to the Government in 1869, five members concurring and three dissenting, although the decision was not promulgated until early in the following year.¹ One of the concurring associate justices resigned before the decision was announced and died soon afterward, reducing the members of the court to the number prescribed in the act of 1866, as its permanent organization.

In 1869, however, another statute was enacted, reorganizing the court and requiring it to be composed of a chief justice and eight associate justices. This act was passed in the month of April, when the court consisted of eight members, but by its terms did not take effect until the following December; and it authorized the appointment of the additional associate justice to make the requisite number of members for the final reorganization. The decision of the legal tender case holding it to be unconstitutional was agreed to in conference in November, but its announcement was deferred for the completion of the opinion of the court, which was read and approved in final conference on the 29th day of January, 1870, and would have been delivered and the decision announced two days afterward in open court, if a postponement for a week had not been granted at the request of the minority for the completion of their dissenting opinion.

1. 8 Wallace Reports, 603-4.

Mr. Justice Grier, who had concurred in the decision, tendered his resignation as associate justice in December, 1869, to take effect on the 1st day of February following, which was accepted accordingly. Edwin M. Stanton was nominated and confirmed on the 20th day of December to fill this prospective vacancy. He died four days afterward. Ebenezer R. Hoar, then holding the office of attorney general, was also nominated in December as the additional associate justice to complete the reorganization of the court, but this nomination was held under advisement and finally rejected by the Senate on the 3rd day of February, 1870. Subsequently William Strong, who had been selected to succeed Mr. Hoar as attorney general in the event of the latter's confirmation, was nominated to fill the vacancy caused by the death of Mr. Stanton, and was confirmed on the 18th day of February. Joseph P. Bradley was nominated as the additional associate justice in place of Mr. Hoar, and confirmed on the 21st day of March, 1870. No other change in the number of members has been made in the organization of the court.

THE LAST RE-ORGANIZATION, A COERCIVE MEASURE TO SECURE JUDICIAL APPROVAL OF LEGAL TENDER PROVISIONS.

The rationale of the two latest reorganizations of the Supreme Court will disclose the weakest part of our National judicial system, and go far to justify the forecast of those members in the Convention who opposed its adoption. The act of 1866 was evidently passed to prevent the appointment of associate justices from the southern States until after the novel questions growing out of their late rebellion and the reconstruction of their State Governments under congressional enactments had been brought before the court and finally determined. But when it became apparent from the course pur-

sued by the court in listening to arguments reproduced in different cases supposed to involve the validity of the legal tender clauses contained in the acts of Congress, and finally in ordering the reargument of a case in which the decision of the question could no longer be avoided, that its members were prepared to hold that those clauses were in violation of the Constitution, the Congress, with the concurrence of the executive, suddenly reversed the policy of reducing the number of judges and by the latest act of reorganization increased the number of the associate justices from six to eight. The evident object was to procure, if necessary, a reconsideration and reversal or recantation of any decision that might be made against the validity of the legal tender provisions.

This was an undisguised proceeding on the part of the executive and legislative branches of the Government to reorganize the court as a penalty for its judicial action and to procure a revocation and reversal of its decision in the determination of a distinctively judicial question of constitutional law. And it is the mournful duty of the historian to add that the expedient was successful and the object thus sought to be accomplished distinctly attained. The two persons named by the executive as associate justices in December, 1869, one of whom was confirmed and the other rejected by the Senate, and the two persons appointed in February and March, 1870, were all known to entertain opinions adverse to the former decision, and were doubtless selected for that reason. These appointments were therefore severely criticized, although it was acknowledged that the appointees were gentlemen of high character, great ability and large professional experience. The real ground of public criticism was the concerted action of the executive and legislative departments in making provision anticipatory of an adverse decision for the reorganization of the court; and when the exigency arose, the appointment of judges accordingly to accomplish the ratification and

approval of legislation which in the proper exercise of the judicial power had been condemned as unconstitutional and void.

Four days after the last reorganization was completed by the appointment of Mr. Justice Bradley, an application was made to the court by the Attorney General, Mr. Hoar, his rejection as an associate justice by the Senate having no connection with his views concerning the validity of the legal tender provisions, to fix an early day for the argument of two other cases in which it was claimed that the legal tender issues were involved; and the application was granted, five judges concurring and four dissenting. But when the time arrived, the appellants in those cases moved to dismiss their appeals and this motion was granted, the court holding that it was their legal right to withdraw them; and the exercise of this right deprived the court of jurisdiction to reconsider or determine those issues.¹ The next year,² however, two more cases came before the court, in which the validity of the legal tender acts was involved, and the constitutional question was again presented and determined, a majority of the judges, five to four, concurring in overruling the prior decision and in holding that the acts were in strict conformity to the Constitution and therefore valid.³ This result was achieved by the united action of the three associate justices, who dissented from the former decision, and the two additional associate justices appointed after that decision was made.

A candid consideration of these facts contained in the judicial records of the country, in connection with the course of legislation during the same period, justifies the conclusion that the court was influenced and eventually controlled in its procedure by the active interposition of the executive and

1. 9 Wallace Reports, 145-6.

2. 1871.

3. 12 Wallace Reports, 457, 528.

Congress, and was thus induced to conform its views to their dictation by overruling its first decision and upholding their official action. And this untoward result, it must be admitted, dealt a serious blow to the original plan of three coordinate departments of the Government, as formulated in the Constitution.

A deplorable incident of that unfortunate controversy was the spirit of personal partisanship it engendered among the members of the court. This undesirable tendency was deliberately displayed in a signed statement prepared as a vehicle of information to posterity, which was drafted by the author of the dissenting opinion from the original decision. In this singular appeal to their countrymen, the three dissenting justices assigned as an excuse, if not as a justification, of their subsequent action in joining in the final judgment overruling the previous decision of the court, that one of the justices who had concurred in making it was "so aged and infirm" at the time as to render his concurrence of no weight or influence.¹ This justice, however, was one of the members of the court and entitled to vote. But if the implication be well founded that he was disqualified by incapacity to act, the conclusive answer is that the remaining seven members were a quorum, and four of them were competent to render a legal decision.

This extraordinary judicial precedent was subsequently ratified and confirmed by the court in other decisions, and they may therefore be regarded as settling for the time being the validity of such legislation.² But the erratic course of procedure by which it was accomplished must ever remain a grave cause of reproach to the executive and legislative branches of the Government, and especially to the particular members of the court who became the willing instruments of

1. This remarkable production is contained in a posthumous publication of the Miscellaneous Writings of Joseph P. Bradley, 71-74.

2. *Juliand v. Greenman*, 110 U. S. 421.

a political project of the executive and Congress to secure a judicial endorsement of a governmental policy of at least doubtful constitutionality, by reorganizing the court and increasing its members for that purpose—in a word, by “packing” the highest judicial tribunal in the land to obtain a decision contrary to its original and deliberate judgment. Passive acquiescence in such a revolutionary proceeding cannot be expected of a free and intelligent people, alert in their attention to the trend of governmental policies and in their detection of all violations of the great charter of their rights and liberties. Such a supine submission to external interference with the proper exercise of its judicial functions would result in depriving the court of a most essential part of its constitutional jurisdiction as pointed out in subsequent chapters,¹ and eventually in relegating the judicial department to a subordinate position in the General Government. If, whenever a similar exigency arises, the executive and Congress can, by increasing its members and appointing additional justices sufficient to over-ride the old organization, coerce the court to sustain their action as valid under the Constitution, one of the principal purposes of its creation will fail of fulfillment. The court will no longer be able to assert its independence, and as a truckling subordinate to the other governmental departments will only hold a position in our system of government similar to that of the House of Lords in the Parliament of Great Britain.

SIMILAR LEGISLATION TO PREVENT EXERCISE OF JURISDICTION BY THE COURT.

While no other direct attempt has been made to change the organization of the court for the sole purpose of controlling its decisions, other means have been resorted to to accomplish the same result, equally derogatory to its dignity. The Con-

1. Ch. 2 of Jurisdiction.

gress has directly intervened by affirmative legislation, repealing prior legislation recognizing the jurisdiction of the court to hear and determine a particular case or class of cases, which had in the ordinary course of procedure been submitted to it for final judgment. An example of this kind will be given in this connection, but this subject will be considered more at large in the succeeding chapters relating to "Jurisdiction."

A statute was passed in 1867, amending the judiciary act of 1789, and extending the jurisdiction of the inferior Federal courts and judges by authorizing them to grant writs of *habeas corpus* in all cases where any person was restrained of his liberty in violation of the Constitution or of any treaty or law of the United States; and also recognizing and regulating the right of appeal from the final decision of any judge or inferior court to the circuit court for the district in which the case was heard, and from the judgment of the circuit court to the Supreme Court. Such a writ was accordingly issued in the first instance by a circuit court upon a petition alleging unlawful restraint of the petitioner by military force. The commanding officer made a return to the writ admitting the restraint but denying that it was unlawful. The circuit court decided that the restraint was lawful and remanded the petitioner to military custody. An appeal was then taken to the Supreme Court and after that court had affirmed its jurisdiction¹ to hear and determine the cause, it was argued on the merits and taken under advisement. Before the final decision, however, an act was passed by the Congress in 1868 repealing the statute of 1867; the repealing act was vetoed by the President and was then repassed by the constitutional majority; and it was held by the court that the latter act deprived it of the power to determine the merits of the appeal.²

1. Ex parte McCardle, 6 Wallace Rep. 318, 326.

2. Ex parte McCardle, 7 Wallace Rep. 506, 514.

EQUALLY INDECOROUS AND UNWARRANTED TREATMENT OF THE COURT BY THE EXECUTIVE IN REFUSING TO EXECUTE ITS FINAL JUDGMENT OVERRULING THE DECISION OF A STATE TRIBUNAL.

Thirty-five years earlier¹ President Jackson had publicly derided a judgment of the court, upholding the territorial rights of the Cherokee Indians under the laws and treaties of the United States.² The court reversed a judgment of the superior court of Georgia, convicting a citizen of violating a State statute and sentencing him to imprisonment and hard labor for a term of years, upon the distinct ground that the statute was in flagrant violation of the Constitution, and the laws and treaties of the Federal Government.³ The President refused to execute the judgment of reversal or to permit it to be carried into effect, by discharging the captive, whose sole offense consisted of his having entered the disputed territory as a missionary to the Indians; and he was accordingly compelled to sacrifice his rights of citizenship and submit as a felon to an invalid decision enforcing a local statute which had been condemned by the court of last resort as of no legal force or validity. And this executive appointed a majority of the members of the court during his continuance in office. The prevision of those members of the constitutional convention, who opposed the method which was adopted of appointing the judges, was accordingly confirmed within a period of forty-five years after the court was organized.

1. 1832.

2. 1 Greeley's American Conflict, 106.

3. Worcester v. Georgia, 6 Peters, 515.

THE LEGISLATION OF 1801, REPEALED IN 1802, A PARTISAN AND
REPREHENSIBLE EFFORT TO CREATE ADDITIONAL JUDGES AND
COURTS BEFORE THEY WERE NEEDED.

There had been still earlier indications of the natural tendency of the executive and legislative departments to unite against the judiciary, or separately to interpose obstacles to the exercise of its jurisdiction concerning questions involving the validity of their joint or separate action in governmental policy and procedure. In February, 1801, after the defeat in the previous year of President Adams for re-election, an Act was passed, and approved by him, reorganizing the entire Federal judiciary by reducing, after the death of one of the justices, the number of associate justices of the court to four, also increasing the number of circuit and district courts throughout the country and authorizing the appointment of twenty-three additional judges for those courts. These additional judges were appointed on the third of March, 1801, a few hours before the expiration of the official terms of the outgoing President and Congress.

The evident purpose of the executive and the concurring majority of Congress was to secure the selection of judges for the ensuing presidential term and an indefinite period thereafter, whose political predilections were in harmony with the outgoing administration. The line of division then and now, sharply drawn, between the political parties of the country, was upon the interpretation of the provisions of the Constitution; and the Federalists indulged the hope that this mode of forestalling the reorganization of the courts, would, by a series of judicial precedents, permanently fasten their theory of constitutional interpretation upon all the governmental departments. The act of 1801, however, was repealed the next year,¹ after a series of most exciting and exasperating

1. March 8, 1802.

14 SENATE UNSAFE DEPOSITARY OF POWER OF APPOINTMENT.

debates in both Houses of Congress. Gouverneur Morris, as a senator from New York, took a leading part in these discussions and largely contributed to the refutation of his earlier utterances in the constitutional Convention in favor of the method adopted, of joining the Senate with the executive in making the judicial appointments. But it may be doubted whether any other method suggested in the Convention would have been more successful in securing a competent and independent tribunal of last resort; and no one in those days thought of proposing a choice of the judiciary directly or indirectly by popular election.

Doubtless under any system of selection there is a considerable margin of choice and uncertainty, arising from the pressure of public opinion, or of political partisanship or personal partiality, which may result in the exclusion of the most capable and best qualified aspirants for judicial station. All human agencies are liable at times to lose their bearings, so that every possible provision of anticipation should be made to guide and regulate the exercise of the power of choice; but much, indeed the substance or essential part of the official act of selection, is necessarily left to the sole discretion of the depositary of the power.

It was assumed by the founders that the Senate, whose members were required to be chosen by the legislatures of the several States, and who represent more especially the wealth and intelligence of their constituencies, would prove to be the most conservative political body in the nation. This view, however, has not been invariably sustained by the results of experience. The senatorial majority, whether its members were of the same as, or of the opposite political faith to, the executive, have frequently failed on great occasions to meet the just expectations of the country. The Acts of February, 1801, and March, 1802, were first introduced into the Senate, and the senatorial debates concerning the judiciary, which

preceded the legislation in both instances, were even more invidious and intemperate than those of the immediate representatives of the people in the lower House.

SENATORIAL CONDEMNATION OF PRESIDENT JACKSON IN 1834 A
VIOLENT AND UNJUSTIFIABLE PROCEEDING.

Again, in 1834, the Senate, ignoring the constitutional provision requiring it to act in a judicial capacity in all cases involving charges against the executive of illegal or unconstitutional action in his department, assumed, as a legislative body, to pass and incorporate in its records a resolution declaring that in his proceedings relating to the revenue President Jackson had arrogated to himself "authority and power not conferred by the Constitution and laws but in derogation of both." The Senate thus committed itself in advance to an opinion upon a question of law and fact, which might have become the subject of an impeachment of the President by the House of Representatives, and of a trial before the Senate itself sitting as a court of impeachment. The President was in this manner condemned by the only official body authorized to sit as a tribunal to try and determine the alleged offence; and he was proclaimed to the country as guilty of a violation of the Constitution, not only without a formal charge preferred against him by the grand inquest of the nation, but before he was given a hearing or even an opportunity to answer the senatorial accusation. Moreover, the Senate subsequently refused to accept or file his denial of the imputation as well as his protest against its improper and unauthorized course of procedure. The extraordinary features of this singular proceeding were that it was approved by three political leaders, who by general acclaim were the most distinguished members of the Senate, and that two of them were the most active and efficient instigators of the movement.

This proceeding was such a flagrant violation of senatorial propriety that it largely contributed to, if it did not actually cause, a complete reaction in the legislative constituencies which resulted within three years in a subversion and reversal of the political majority of its membership; and the Senate thereupon revoked its former act of condemnation and expunged all reference to it from its records. It is proper, however, to add that both resolutions were only carried by partisan majorities.

THE DRED SCOTT CASE, AN EXAMPLE OF JUDICIAL SUBSERVIENCE TO POLITICAL INFLUENCE.

Another unfortunate example of the occasional proclivity and similar readiness of some of the members of the court, under the present method of its organization, to pass over the boundary line of judicial discussion into the political arena, and enlist in efforts to influence the public policy and procedure of the other governmental departments, is afforded by the ill-starred decision in the case of *Dred Scott*.¹ That case was heard upon a record brought up by a writ of error from a judgment of the Circuit Court for the District of Missouri, and involved the validity of the claim of the plaintiff in error, who was a negro, to the freedom of himself, his wife and children from involuntary servitude. The claim was based on the following undisputed facts. The master of *Dred Scott* was a surgeon in the army, and had taken him as a body servant from Missouri to Rock Island in the State of Illinois, and thence to Fort Snelling in the Territory of Wisconsin, remaining at each place for two years or more. *Scott* was married at the latter place, and his wife, who was also a slave, had been taken there under similar circumstances; and both

1. 19 Howard, 393-6.

of them afterwards returned with their master to the State of Missouri. If Scott had brought his action in the State of Illinois, while held there, he would doubtless have recovered his liberty under the rule recognized and enforced in similar cases.¹ Or if he had commenced his action while at Fort Snelling, the same result would have followed, unless the prohibition contained in the Act of Congress of 1820, known as the Missouri Compromise, were adjudged to be in violation of the Constitution; and even if it were so held, he would still have been entitled to his freedom unless it were also decided that the Constitution recognised and protected slavery in the Territories. But the latter questions could not be properly considered or judicially determined until they were directly and necessarily presented in the record for adjudication. These questions were, however, mooted on the argument, upon the theory that the writ of error brought up for review a preliminary decision made at the trial overruling a plea in abatement to the jurisdiction of the court, which had been interposed by the master before filing his plea in bar to the declaration. The circuit court, in disposing of the issues raised by the latter plea, had decided, following in this respect a prior decision of the State court in a similar case between the same parties, that Scott and his family in returning with their master to their old home, renewed and thereafter retained their domicile of origin in Missouri, which remanded them to slavery. It was upon this ground that the Supreme Court, after the first argument at the December term of 1855, concluded to place its decision of affirmance, and selected one of its members to write the opinion. This conclusion rendered it unnecessary to discuss or determine any other question, even if it were otherwise a proper subject of consideration. There were no other questions involved in the case, excepting those presented by the ruling on the plea

1. *Lemmon Case*, 20 N. Y. 502-3; *Jarrot v. Jarrot*, 7 Ill. 1.

in abatement, and those were waived by the master in filing the plea in bar to the merits, and they could not be raised by the plaintiff in error because the decision below overruling the plea in abatement was in his favor. This precise proposition had been decided by the Supreme Court, all the judges concurring, only three years before, in a case where it was the only question before the court, and had received careful consideration. In that case it was distinctly held that all "objections to the jurisdiction of the court, or to the competency of the parties, were matters pleadable in abatement only, and that if, after such matters were relied on, a defence was interposed in bar, going to the merits of the controversy, the grounds alleged in abatement became thereby immaterial and were waived."¹

The opinion prepared under the direction of the court in the case of Dred Scott was accordingly confined to the discussion of the personal status of Scott as a claimant to citizenship under the law of Missouri, and this opinion was read in conference at the ensuing term of the court in December, 1856. In the meantime a presidential election had occurred, in which political issues involving the constitutional validity of the provision contained in the Act of Congress of 1820 prohibiting the extension of slavery into any National territory west of Missouri and north of 36° 30' north latitude, and also the right of slaveholders from the southern States to migrate with their slaves into any and all the Territories of the United States, were mooted in the public press, in partisan conventions, and on the hustings throughout the country. These public disputations had kindled the passions of the people and aroused intense and bitter animosity between the opposing sections on the slavery question, even to the verge of hostile collision and a fratricidal struggle for supremacy.

1. *Shepperd v. Graves*, 14 Howard, 505, 510.

The actual conflict in Kansas between the emigrants from the North and the South gave a practical phase and aim to these political issues, and stimulated the contending factions in Congress to persistent efforts at legislation, repealing the statutory limitation of slavery, which was finally, though indirectly, accomplished by a declaration to that effect in the act of organization of the Territories of Kansas and Nebraska. But this left the question still open whether the Constitution, in the absence of legislation, recognized and protected the institution of slavery in the Territories. The members of the court were doubtless more or less imbued with the prepossessions and prejudices of the population in the several States or sections of the country from which they came, and were much concerned at the general prevalence as well as the acrimony and violence of the agitation. Their concern was not allayed when the result of the election failed to effect a restraining or pacifying influence upon the prevailing sectional differences, and, in the stress of this emergency, they conceived the project of bringing the influence of the court to bear, if possible, upon the sinister situation. It occurred or was suggested to some of the judges that the decision in the case might be utilized to accomplish this purpose. An informal meeting of the judges was accordingly arranged, at which several were present, when the subject was considered and the conclusion reached to treat those questions as presented in the record, and therefore proper for judicial determination; and the chief justice was selected to write the opinion. The case was re-argued at the next term and the chief justice prepared an elaborate opinion, in which he reached the several conclusions that the preliminary decision of the trial court overruling the defendant's plea in abatement was brought before the court by the plaintiff's writ of error, despite the interposition of the subsequent plea in bar and the final judgment for defendant on the merits; that a

free negro of the African race was not a citizen of the United States; that the Constitution recognized slaves as property, and conferred the right upon the owner to take and hold such property in any of the Territories; and that the prohibition contained in the Act of Congress of 1820 was therefore unconstitutional and void. A majority of the judges disagreed with the chief justice and concurred in holding that the ruling at the circuit on the plea in abatement was not before the court for review,¹ but coincided with the chief justice upon the other propositions discussed in his opinion. This decision was communicated to the incoming President of the United States before it was announced from the bench, and was referred to by him in his inaugural address on the 4th of March, 1857, as a happy augury of peace and of the final settlement of the controversy. In the official report of the case the opinion of the chief justice is given as the opinion of the court upon all the questions discussed in it. The judges who concurred in this course of procedure were doomed to suffer bitter disappointment and chagrin. Contrary to their anticipations the political agitation continued unabated, and soon afterward developed into actual warfare between the factions in the Territory of Kansas. The court became the target of relentless censure and attack in the Northern States and was deeply involved in the passionate discussions which ensued throughout the country; and the opinion of the chief justice must be regarded as one of the most remarkable as well as unfortunate incidents of the great political upheaval which culminated in the Civil War and resulted in the total abolition of the "peculiar institution."

1. This view is sustained by Justices Nelson and Campbell in letters written by them and published in Tyler's *Memoir of Chief Justice Taney*, p. 382-5. See, also, the remarks of Judge Campbell in memoriam of Judge Curtis, 20 *Wallace*, p. XI. 1 *Life & Writings of B. R. Curtis*, 234-7. Note by George T. Curtis.

PARTISANSHIP PREDOMINANT INFLUENCE WITH SENATORS.

The undesirable tendency to political partisanship increased during the Civil War to such an extent that extreme partisan sentiments were openly avowed in the Senate, not only as sufficient reasons for legislation relating to the judiciary, but even as an adequate foundation for its own final decision when acting in a judicial capacity. It is true that prior to that period eminent men had been chosen from different sections of the country to represent their special interests in favor of or in opposition to the adoption or maintenance of particular governmental policies. These professional advocates were reelected and retained their seats as long as they remained discreet and efficient representatives of the sectional interests which had elevated them to the Senate; and in some instances they received in addition to their salaries public benefactions in gratitude for their services. But in more recent times great corporations have not hesitated to retain senators, if they were members of the bar, as counsel in their behalf, by employing them with liberal compensation to advocate their special interests in the courts; and they have not infrequently procured the election of their own leading counsel or principal officers to represent them in the Senate. Other aspirants for senatorial honors, whose only claim to recognition was their enormous wealth, have not found it difficult to satisfy their ambitions, through political organizations completely under the control of partisan leaders, by whose active interposition they were able to obtain, term after term, their elections by their State legislatures. And there have also been instances where the local "bosses" in the most populous States of the Union have dictated their own elections repeatedly to the Senate of the United States.

These partisan organizations, originally created to repre-

sent political principles having, by the final decision of the issues or points in dispute, accomplished or failed to accomplish the purposes of their creation, were continued in existence for other purposes, and soon became mere elective machines for the control and distribution of official patronage among those who were pledged to obey their behests or contributed freely to their support and influence. The State leaders ruled the main "organizations," and their subordinates ruled under them in the counties, cities and towns or other local subdivisions; and their official beneficiaries in the Senate or elsewhere were compelled to recognize and heed their requisitions in all things that might in the opinions of the "bosses" affect the "organizations." These senators were therefore the real representatives, not of the people or of the States by which they were nominally chosen, but of the "bosses" and the "organizations," who dictated and secured their preferment. It is also a fair inference that these sinister influences may have materially affected the official action of this class of senators in matters beyond the reach of mere partisanship—in other spheres of National concern of the gravest importance. In any event they were normally inclined to look at every proposition from the perspective of the partisan or of the "boss" and to consider the performance of every official duty with particular reference to its possible effect upon the interests of the "organization," and to act accordingly.

SENATORIAL PARTISANSHIP ON TRIAL OF IMPEACHMENT OF PRESIDENT JOHNSON.

But the behavior of the senatorial majority on the trial of the impeachment of President Johnson affords the most convincing evidence of the inveterate partisanship of the

great body of senators, even when required to act in a judicial capacity. The decision of the Senate in that case involved principally the removal of the President from his high office, and incidentally the dispensation of executive patronage during the remainder of his official term. The President, undoubtedly, had been guilty of undignified deportment and of foolish declarations concerning the opposition of Congress to his reconstruction policy, which had aroused partisan passion and resentment in the Northern States and resulted in his impeachment by the House of Representatives. The principal charge among the "high crimes and misdemeanors" preferred against him was that he had attempted to remove one of the members of his cabinet, the Secretary of War, contrary to the provisions of the act of Congress relating to the tenure of civil office. This act had been passed the year before over the executive veto for the avowed purpose of limiting and controlling, among other things, the power of the President over the members of his cabinet. These officers were merely executive clerks, as heads of the several departments, and represented him as the depositary of the executive power, as was held afterward by the Supreme Court. The President claimed that the act was unconstitutional and void; and having become dissatisfied with the incumbent of the War Department, he issued an order for his removal, and designated an officer of the army as his *successor ad interim* until a future appointment should be made.

This power of removal of a cabinet officer by the President had been exercised under the Constitution from the foundation of the Government. The President as well as the Congress, as shown in the chapters on "Jurisdiction," had a right in administering his department, to interpret the provisions of the Constitution until the Supreme Court as the final arbiter was called upon judicially to determine their veritable meaning. President Johnson exercised this right in making

the order removing his Secretary of War; and by so doing afforded an opportunity to the old incumbent of the office to contest the validity of the order by refusing to yield possession of it and compelling the new claimant to resort to the courts for relief. Instead of remitting the contestants to this legal remedy, the lower House of Congress had recourse to impeachment of the President; and the Senate was only prevented from having "the concurrence of two-thirds of the members present" and from convicting and removing him from office, by the votes of seven of the forty-two senators composing the political majority in that body; and these seven senators, by the act of voting for his acquittal in accordance with their conceptions of duty, incurred the penalty of desertion from the "organization," and thereby sacrificed their future careers in the line of official recognition or preferment. They were successively immolated upon the altar of popular indignation for an act of public justice in preventing a senatorial decision which would have proved a dangerous precedent in our governmental procedure and might indeed have lead to the introduction of the revolutionary methods in vogue in the Latin republics of Central and South America, of resorting to sedition and force to overthrow the results of elections or to accomplish the removal of unpopular public officers.

The impeachment itself, having been found upon the grounds stated in the formal articles, was in plain violation of the Constitution and therefore a revolutionary proceeding. If the President had been found guilty and a formal judgment rendered removing him from his office, he and the loyal members of his cabinet might well have refused to vacate the public offices upon the ground that the entire proceeding, including the senatorial conviction, was unconstitutional and void, leaving the President of the Senate *pro tempore* to pursue any legal remedy that he deemed proper and effectual to ac-

comply with his purpose. If, on the other hand, the latter appealed to force to obtain such possession and met with resistance, it would have resulted in civil war.

RELENTLESS PARTISANSHIP OF ELECTORAL COMMISSION.

This narrow party spirit was manifested in the same manner in both Houses of Congress, and by several members of the Supreme Court in the settlement of the presidential contest of 1876-7. It seemed to be taken for granted in naming the members of the Electoral Commission to decide which of the disputed electoral votes returned from certain States should be counted that senators and representatives would, regardless of evidence, support the claims of those persons as such electors who were nominated and presented by the party to which such senators and representatives respectively belonged, and the great struggle of those in the apparent minority was to obtain at least one of the judges named from the Supreme Court, who would disregard his political predilections and act with judicial impartiality and independence. This effort, however, signally failed, and the decisions of the Commission, even when they turned upon a simple legal proposition, were apparently influenced, if not controlled, by the political prepossessions of its members.

The Commission was composed of five members of the Senate, three of whom were republicans and two democrats, five members of the House of Representatives, three democrats and two republicans, and five members of the court, three republicans and two democrats; and in nearly all the cases presented for its inquisition the final decisions were made by eight republicans voting indirectly in favor of the republican electors against seven democrats voting in the same manner for the democratic electors. It will be observed that even

the justices of the court were seemingly affected by the contaminated atmosphere of their Machiavellian associations and also divided on political lines upon nearly all material questions involved in the investigation. The three republicans were the same justices who had been chiefly instrumental in overruling and superseding the original legal tender decision of the Supreme Court.

The principal legal points involved in the electoral controversy were, (1), whether the official certificates of the results of the State elections contested before the Commission, could be shown to be false and fraudulent and therefore illegal; and if that were shown, (2), whether the actual results of the elections could be established *aliunde* when they were susceptible of proof. If both propositions were sustained and satisfactory evidence given with reference to any election in dispute, it was claimed on behalf of the democrats that the fraudulent certificates should be rejected and the veritable results received and given effect. But if the first proposition only were maintained and the second failed for insufficient evidence, they insisted that the entire electoral vote of the State should be excluded as not sustained by a valid return nor supported by other convincing evidence.

The regular official returns of the electoral votes of Florida and Louisiana were duly objected to on the ground, among others, that they were false and fraudulent; and the contestants offered to prove that the State boards had intentionally and corruptly rejected and refused to count or to include in their returns as certified more than enough votes cast at the State elections to change the final results. In the case of Florida it was known that all the votes of one county and parts of those of three other counties were thrown out by a majority of the board of State canvassers, which enabled them to certify to the choice of the Hayes electors; and it was undisputed that if those votes were included in the canvass,

the Tilden electors received a majority and were duly chosen. In the case of Louisiana it appeared from the local returns of the several election districts that the Tilden electors had actually received a majority of 7,659 over those who were certified by the returning board as having been chosen to cast the vote of the State in the electoral college. The Commission overruled the objections and rejected the evidence in both cases, holding that it had no power under the Act of Congress creating it, to look for any information concerning the results of the elections outside of the official returns of the State boards, or the certificates of the State executives, whether the returns or certificates were true or false, genuine or spurious, honest and accurate or fictitious and fraudulent.¹

1. Lest this should be deemed an unfair statement of the main issue involved in these rulings of the Commission, a brief reference to the record of the deliberations of the Commission is appended. While the Commission was in consultation, Mr. Justice Field, one of its members, addressed his associates as follows: "I put yesterday to these gentlemen (who argued in favor of the rulings) this question: Supposing the canvassers had made a mistake in addition in footing up the return, a mistake that changed the result of the election, and acting upon the supposed correctness of the addition they had issued a certificate to persons as electors who were not in fact chosen, and such persons had in fact met and voted for President and Vice-President and transmitted the certificate of their votes to Washington; and afterwards, before the votes were counted by the two Houses of Congress, the mistake was discovered—was there no remedy? The gentlemen answered that there was none; that whatever mistakes of the kind may have been committed must be corrected before the vote was cast by the electors or they could not be corrected at all. If this be sound doctrine, then it follows that by a clerical mistake in arithmetical computation, a person may be placed in the Chief Magistracy of the nation against the will of the people, and the two Houses of Congress are powerless to prevent the wrong.

"But the gentlemen do not stop here. I put the further question to them: Supposing the canvassers were bribed to alter the returns and thus change the result, or they had entered into a conspiracy to commit a fraud of this kind, and in pursuance of the bribery or conspiracy they did in fact tamper with and alter the returns, and declare as elected persons not chosen by the voters, and such persons had voted and transmitted their vote to the President of the Senate, but before the vote was counted the fraud was de-

The statute creating the Commission provided that whenever objections were interposed to the certificates of electoral votes from any State,

“all such certificates, votes, and papers accompanying the same, together with such objections, shall be forthwith submitted to said

tected and exposed—was there no remedy? The gentlemen answered, as before, that there was none; that whatever fraud may have existed must be proceeded against and its success defeated before the electors voted; that whatever related to their action was then a closed book. If this be sound doctrine, it is the only instance in the world where fraud becomes enshrined and sanctified behind a certificate of its authors. It is elementary knowledge that fraud vitiates all proceedings, even the most solemn; that no form of words, no amount of ceremony, and no solemnity of procedure can shield it from exposure and protect its structure from assault and destruction. The doctrine asserted here would not be applied to uphold the pettiest business transaction, and I can never believe that the Commission will give to it any greater weight in a transaction affecting the Chief Magistracy of the nation.

“But the gentlemen do not stop here. I put the further question to them: Supposing the canvassers were coerced by physical force, by pistols presented to their heads, to certify to the election of persons not chosen by the people, and the persons thus declared elected cast the vote of the State—was there no remedy? and the answer was the same as that given before. For any wrong, mistake, fraud or coercion in the action of the canvassers, say these gentlemen, the remedy must be applied before the electors have voted; the work of the electors is done when they have acted and there is no power under existing law by which the wrong can be subsequently righted.

“The canvass of the votes in Florida was not completed until the morning of the day of the meeting of the electoral college, and within a few hours afterward its vote was cast. To have corrected any mistake or fraud during those hours, by any proceeding known to the law, would have been impossible. The position of these gentlemen is, therefore, that there is no remedy, however great the mistake or crime committed. If this be sound doctrine, if the representatives in Congress of forty-two millions of people possess no power to protect the country from the installation of a Chief Magistrate through mistake, fraud, or force, we are the only self-governing people in the world held in hopeless bondage at the mercy of political jugglers and tricksters.” (Electoral Commission Proceedings, 980, I.) And one or more of these propositions were involved in the decision of the Florida and Louisiana cases.

Commission, which shall proceed to consider the same with the *same powers*, if any, now possessed for that purpose by *the two Houses*, acting separately or together, and by a majority of votes decide whether any and what votes from such State *are the votes provided* for by the *Constitution* of the United States, and how many and what persons are *duly appointed* electors in such State, and may therein take into view such petitions, *depositions* and other papers, if any, as shall, by the Constitution and now existing law, be competent and pertinent in such consideration."

The simple question before the Commission, therefore, was, whether the two Houses of Congress under the Constitution were invested with the power of counting only the actual, true and genuine electoral votes of the States, or were obliged to count spurious and fictitious votes of fraudulent claimants, although their claims were based upon false certificates of the results of the votes cast at the State elections? The Constitution, after authorizing each State "to appoint in such manner as the legislature thereof may direct" its quota of electors, enjoined "the electors," i.e., those who had been actually chosen, to "meet in their respective States and vote by ballot for President and Vice-President." "The electors" were also required to make, sign, and certify "distinct lists of all persons voted for as President and all persons voted for as Vice-President, and of the number of votes for each," and transmit them under seal to the seat of government, "directed to the President of the Senate," who was charged with the duty of opening "in the presence of the Senate and the House of Representatives, all the certificates;" and, quoting again the language of the Constitution, "the votes shall then be counted."¹ The act of Congress, then in force, imposed the additional duty upon "the executive of each State to cause three lists of the electors of such State to be made, certified and delivered to the electors" before their meeting for the purpose of

1. Articles II, sub. 2, and XII.

casting the electoral vote which they were required to annex to their own certificates of the results of such voting, and transmit to the proper officers at the Capitol of the United States.

It will be observed that the Constitution confers no other power relating to the presidential election upon the States than "to appoint" the electors; and each State may therefore determine the method of appointment, i.e., of choosing or electing them, and there its authority ends. But whatever method is adopted and pursued, it must be proven to the two Houses that the appointment was the veritable act of the State. The evidence of such appointment or election, of the meeting of the electors actually chosen, and of the electoral votes cast at the meeting, is required and must be governed exclusively by the Constitution and Acts of Congress. It will also be noted that a formal certificate made by the persons claiming to be electors from any State, is the only requirement mentioned in the Constitution as evidence of the requisite facts of their "appointment" and personal identity as well as of the authenticity of their own votes in the local branch of the electoral college. The Federal statute required the certificate of the State executive as additional or corroborative evidence of the "appointment" and identity of the persons chosen as electors. The Governor can have no personal knowledge of the actual result of the State election, and his certificate is, therefore, merely a representation of the result as declared by the returning boards and State canvassers. Accordingly whenever there are two or more sets of claimants from a State to the office of electors, and two or more formal certificates of such contestants are transmitted and delivered to the President of the Senate, each of which contains a list of votes purporting to have been cast by different electors for opposing candidates, the two Houses of Congress, in order to properly perform the constitutional duty of counting the

votes and announcing the result, must *ex necessitate rei* determine which of the different votes returned in the diverse certificates are the veritable votes of "the electors." There is no intermediate body referred to in the Constitution, nor in the statute, and the constitutional mandate is peremptory that when the certificates are opened in the presence of the two Houses, the votes shall then and there be counted. As this mandate cannot be obeyed without selecting the particular votes to be included in the calculation, the implication is inevitable that Congress shall determine between the lists contained in the contradictory certificates, which of them shall be accepted as genuine. The "count" required to be made of "the electors" is, therefore, not simply the adding or footing up of an accountant, but the calculation of the responsible head or principal authority, who must verify and answer for the correctness of each of the several factors, as well as the general accuracy of the computation.

The several States are to "appoint" their electors in the manner designated by their legislatures, but the two Houses of Congress are required to count the votes of "the electors" from all the States and ascertain the general result in the Nation. In the absence of local statutory provisions for the settlement of disputes between contestants claiming to have been chosen electors, or of any proceedings under such statutes to determine the disputes, there is no other resort for such a determination than the two Houses of Congress. The direction to count "the votes" of "the electors," i.e., the actual votes of those actually chosen as electors, is the imposition of an imperative duty, which must be strictly performed; and its performance distinctly involves an act or exertion of power pursuant to the direction. The compliance with this direction is therefore the exercise of one of the affirmative powers conferred by the Constitution and in the absence of a specific direction as to the method of exercising the power

it must be assumed, in the language of Chief Justice Marshall, that the

“ Congress would have some choice of means ; that it might employ those which in its judgment would most advantageously effect the object to be accomplished.” “ The Government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.” “ The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention to clog and embarrass its execution by withholding the most appropriate means.” “ The subject is the execution of (one of) those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, so far as human prudence could insure, their beneficial execution.” “ We admit, as all must admit, that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.”¹

The result in a single State may, and in the election of 1876 did, in fact, determine the result of the National election. The other States in the Union therefore may be, and in that election were, as much interested in the just and correct determination of the controversy as the particular State in which it arose. It is a necessary sequence that the two Houses of Congress, representing the people of all the States, must, to prevent usurpation of the presidency, see to it that only authoritative votes of authentic electors are included in the

1. *McCulloch v. Maryland*, 4 Wheaton, 316, 408-10, 415, 419, 421.

count they are empowered to make, to ascertain who are duly elected. Even if the authorities of one or more of the States were willing to ignore or connive at a fraudulent canvass of the votes given at the local elections for the purpose of foisting fraudulent electors into office and thus changing the general result of the presidential election, it would be the imperative duty of the two Houses, in the interest of the Nation, to discover, if possible, and expose the fraud, and to refuse to count the votes listed and returned in the false certificates. It is, indeed, too plain for discussion that false certificates made by a deluded or corrupt executive, or by defeated candidates for electors, and based upon a fraudulent canvass of the votes at a State election, should not be permitted to dictate the final result in the electoral count of the two Houses of Congress, and thus impose upon all of the States for four years an unauthorized and fraudulent administration of the General Government.

This view of the power of the two Houses to ascertain and determine the electoral votes that should be counted, and to reject such votes as might be found to be illegal for any reason, had been maintained and exercised by them in counting the electoral votes in 1865, 1869 and 1873. The Congress adopted a joint resolution on the 6th day of February, 1865, which declared that the authorities in eleven States, naming them, had rebelled against the Government of the United States, and therefore resolved that those States "were not entitled to representation in the electoral college," and that "no electoral votes should be received or counted from those States" for President or Vice-President.¹ This resolution was sent to President Lincoln, and was returned two days later with his approval, given as he stated, "in deference to the view of Congress," properly disclaiming, however, "all right of the executive to interfere in any way in the matter

1. Appendix to Cong. Globe, part 2, 2d Session 38 Congress, p. 159.

of canvassing or counting electoral votes." He added, that in his opinion "the Houses of Congress, convened under the 12th Article of the Constitution, *have complete power to exclude from counting all electoral votes deemed by them to be illegal.*"¹ This joint resolution was not repealed until 1876. In the meantime,² long after the reconstruction of the State Government of Louisiana, the entire electoral vote of that State was again rejected by the two Houses as fraudulent and illegal. This action was taken notwithstanding the fact that a certificate in due form by the Governor of the State was transmitted by him and received at Washington containing a list of the electors chosen at the State election, and was taken on the distinct ground that it appeared from evidence *aliunde* received and returned by a senatorial committee "that the official returns of the election of electors from the various parishes had never been counted by anybody having authority to count them." It had, however, been decided by the Supreme Court of the State, that the officers who made the returns "constituted the only legal returning board" for that purpose. One of the majority members of the Electoral Commission was chairman of that committee and concurred in, if he did not dictate that report; and he and another member of the Commission also voted for the exclusion of the electoral vote of the State.³ In this connection it should not escape notice that there was then no partisan motive to induce the decision nor any political object to be attained in the rejection of these electoral votes, as their exclusion did not affect the general result of the presidential election. If the votes had been counted the opposing candidate would still have received a large majority of the electoral votes in the Nation. It was therefore deemed desirable to set a precedent

1. 6 Messages of Presidents, p. 260.

2. 1873.

3. Cong. Globe, 3d Session, 42d Congress, pp. 1219, 1292-3.

for future avail or need in an emergency, and the decision was made, as then announced, to settle the question for all time to come.

Subsequently in 1887, the whole subject was regulated by an act of Congress, still in force, in which it is provided that

“ no electoral vote or votes from any State which shall have been regularly given by electors, whose appointment has been lawfully certified to by the State executive, and from which but one return has been received, shall be rejected ” singly by either House ; “ but the *two* houses concurrently *may reject* the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those votes only, shall be counted which shall have been regularly given by the electors who are shown by the determination ” of the State court in a proceeding authorized to be taken for that purpose, “ to have been appointed ; ” “ and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State, then those votes, and those votes *only*, shall be counted which the *two Houses shall concurrently decide* were cast by the lawful electors appointed in accordance with the laws of the State, *unless the two Houses, acting separately, shall concurrently decide* such votes *not* to be the legally appointed electors of such State.” ¹

It thus appears that before and after the decision of the electoral controversy of 1876-7, both Houses of Congress, apart from as well as in connection with the National executive, asserted and authorized the exercise of the identical power, in every respect, which the majority of the Commission were induced, after solemn argument, to hold had not been conferred by the Constitution upon Congress, or the two Houses, separately or concurrently. Moreover, at least four of the majority members of the Commission, three from the

1. 1 U. S. Compiled Statutes, pp. 69, 70, sec. 4.

Senate and one from the House of Representatives, had voted, under the joint resolution of 1865, in favor of the rejection of the electoral vote of Louisiana in 1873; and also voted for the later enactment of 1887, which, under the sanction of the Constitution, provided in detail for the mode of exercising the power by the two Houses of Congress. This statute remains in force, and has been followed in counting the electoral vote given and returned from the several States to the seat of government in all of the subsequent presidential elections.

The decision of the majority of the Commission as appears from the opinions of the concurring associate justices, was put upon the ground that, "the constitutional power conferred upon Congress," did not include the right to "judge of the elections, returns and qualifications of the presidential electors;" and that the certificate of the Governor of Florida, based upon and taken in connection with the canvas of the State board, was conclusive, although the power of the board was in terms limited by the local statute to canvassing the returns of the county boards "*as shown by such returns*," even if the State board refused to be guided by "such returns" in several instances, and did not include in its canvass the actual returns from all the districts in several counties, and notwithstanding a decision of the Supreme Court of the State holding that the board in rejecting such returns in part and not entirely had exceeded its jurisdiction. In the Louisiana case it appeared that there were two claimants to the office of Governor of the State, each of whom made a certificate under the statute, and these certificates disclosed contradictory results.¹ The Commission assumed to decide be-

1. The singular fact should be noted that the successful competitor for the presidency who profited by this decision and held his great office by virtue of the certificate thus sanctioned and confirmed by the Commission, afterward refused to recognize its author as Governor of the State, and officially acknowledged the other contestant, who served out the term accordingly, and whose certificate, if given legal effect, would have resulted in the choice of Mr. Tilden.

tween the contestants and their certificates, accepting one and rejecting the other, and then decided that the certificate they received and approved when considered and weighed with the canvass of the State returning board, was conclusive, although the returning board, which was only empowered by statute, to make an investigation in an election district or parish when a return from such parish was accompanied by a certificate from the parish officers that actual violence carried the local election, had assumed to investigate other parishes and reject all the votes taken therein albeit no certificates of violence accompanied the returns; so that the State board had no jurisdiction. This unjustifiable procedure was apparently necessary to overcome the large majority shown by the parish returns to have been given in the State for the Tilden electors.

Every one of the reasons assigned for the decision of the Electoral Commission is distinctly disregarded or overruled by the legislation of 1887, which maintained the complete power of the two Houses of Congress to inquire into all the facts concerning the "appointment" of presidential electors, the certificates of State executives and canvassers or returning boards to the contrary notwithstanding, and prescribed the method of exercising the power; and this legislation has since received the approval of all parties and classes in the Nation, as clearly sanctioned by the Constitution, and as the only sensible solution of such a controversy. It is therefore a reasonable inference, if not a correct and complete explanation of the part taken in the deliberations and final action of the Commission by those senators and members of Congress who were selected by the two Houses and voted with the majority, in the light especially of their own prior and subsequent acts of participation in the proceedings of the two Houses, that they were unwilling or unable to relieve themselves from the influence of their political affiliations. A dif-

ferent course, however, was generally anticipated of those members of the Commission who were selected from our highest court of justice—a court unequalled in dignity and authority by any other judicial tribunal in ancient or modern times. The country had a right to expect from these learned expounders of the Constitution, whose lives were devoted to the administration of justice, a candid and unbiased determination of the momentous questions which concerned not only the rights of the contestants for the great office of President of the Republic, but also the executive guidance and administration for the term of four years of the public affairs of a Government exercising dominion over forty-five millions of people. The disappointment caused by the decision was painful and profound, and pervaded all classes and conditions of the population, including those of the successful party, who were not its unconditional adherents nor interested in the distribution of its political patronage. Nor were these sentiments surprising, as it was extremely difficult to discern how competent and impartial judges, familiar with the principles of constitutional interpretation and the established legal rules applicable to the undoubted and undisputed facts, could have reached the conclusions concerning the Florida and Louisiana electors announced by the Commission, if, indeed, they were unaffected by partisan predisposition and prejudice.

Some of the supporters of the successful presidential candidate indulged the forlorn hope that he would decline to take the position awarded to him by such an anomalous decision. They were disappointed. It may safely be assumed that a conscientious person in a similar case, affecting merely his private or personal claims, would have refused to accept the proffered benefit or the problematical honor. But a different rule seems to prevail in public affairs even among men of high reputations for probity and worth, who do not hesitate

to lay aside their individuality and to warp their moral fibre in dealing with the political concerns of the Nation, especially in connection with the management and control of popular elections.

The Commission, in determining the electoral votes of South Carolina, after having passed upon those of Florida, Louisiana and other States, assigned as an additional reason for refusing to look into evidence *aliunde* the official certificates, that

“the power of Congress of the United States in its legislative capacity to inquire into the matters alleged, and to act upon the information so obtained, is a very different one from its power in the matter of counting the electoral vote. The votes to be counted are those presented by the State, and when ascertained and presented by the proper authorities of the States they must be counted.”¹

As this reason is equally if not more clearly applicable to the decisions concerning the electoral votes of Florida and Louisiana, it is proper to refer to and refute it in this connection. The majority members of the commission evidently could not bring themselves to advance this ground for their earlier decisions, although it was pressed upon them from the outset; but when the rumblings of dissent and dissatisfaction with their proceedings began to reverberate through the land they concluded, in casting about at the last moment for all possible explanations and excuses, to include this also in the batch of “grounds” or “reasons” to the country for their official action. Mr. Justice Bradley adverted to this point in his opinion in the Louisiana case, but did not then commit himself in its favor. He said:

“Whether the legislative power of Government might not, by law, make provision for an investigation into frauds and illegal-

1. Proceedings of Electoral Commission, 702.

ties, I do not undertake to decide. It cannot be done, in my judgment, by any agency of the Federal Government without legislative regulation, * * * It seems to me, however, the better conclusion, that the jurisdiction of the whole matter *belongs exclusively to the States*. Let them take care to protect themselves from the perpetration of frauds. They need no guardian. They are able, and better able than Congress, to create every kind of political machinery which human prudence can contrive, for circumventing fraud, and preserving their true voice and vote in the presidential election.”¹

This singular deliverance implies that only the State in which the fraud is perpetrated is interested in circumventing it. It ignores the fact that the fraud can only be perpetrated by or in connivance with the State authorities; and that all of these authorities may be quite willing to acquiesce and even to assist not in circumventing but in consummating the fraud, in order to defeat the election of an opposing candidate for President. Have the other States no interest to be protected? Has the General Government no right or interest to be subserved? If the view of this member of the Commission be sound, all the States whose voices or votes are nullified by the fraud as well as the Nation itself, will be sorely in need of guardians. It may happen again that the local authorities will not be in sympathy with the electors chosen in the State at a presidential election, and those authorities may be able and predisposed by means of a fraudulent canvass and false certificates to change the actual result in the State and the general result in all the States, if the false and fraudulent returns *must* be counted.

The conclusive answer to this quibble is that the direction of the Constitution to the “two Houses” to count the votes of the electors is a self-executing provision, and is equivalent to a mandate to perform that duty; and if more than one set

1. Proceedings of Electoral Commission, 1032.

of claimants from any State have voted and transmitted their illegal votes to be counted, the two Houses cannot comply with the direction without ascertaining which of the lists of votes returned is that of "the electors," actually chosen, and therefore entitled to be included in their reckoning. The "two Houses" in the absence of legislation as to the method or details of procedure, are bound in executing the power to adopt the requisite means to elicit the truth and thus enable them to make the proper count. They are created a special tribunal to count the actual votes of the electors actually chosen and no other votes, and therefore are compelled to take such measures as are necessary for that purpose. This is the view of the Supreme Court in a parallel case where original jurisdiction was conferred upon it by the Constitution "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party."¹ The court held,

"that although Congress had undoubtedly the right to prescribe the process and mode of proceeding in such cases * * * yet the omission to legislate on the subject could not deprive the court of the jurisdiction conferred, that it was a duty imposed upon the court, and in the absence of any legislation by Congress the court was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given. * * * And it became, therefore, the duty of the court to mould the proceedings for itself in a manner that would best attain the ends of justice and enable it to exercise the power conferred."²

The judicial quality of the opinions of the three associate justices who joined in the decisions of the Commission may be gauged and ascertained by comparing them with the opin-

1. Art. 3, sec. 2, sub. 2.

2. *Florida v. Georgia*, 17 How. R. 478, 491-2 and cases cited; *Kentucky v. Dennison*, 24 How. R. 66, 96-7.

ions of the same judges in the legal tender cases, in which they all concurred. In those cases each of these justices, in the absence of any provision in the Constitution on the subject, derived from the aggregate of powers conferred upon Congress, such as to declare war, to support an army, to maintain a navy, to suppress insurrection, to coin and to borrow money, the further ancillary power to require its notes, certificates or paper promises given for its loans and indebtedness thus incurred, to be taken and received instead of gold and silver coins as legal tender currency in the payment of all debts contracted either before or after such legislation was passed in the ordinary business transactions of the country. It was practically conceded that the power to "coin money" was restricted to the issue of gold and silver currency, and that the power to "borrow money" was limited to the terms of contracting the loans with the lenders; but it was insisted that the actual exercise of the foregoing powers for the common defense and general welfare in pursuance of the duty imposed on the General Government in time of war or of insurrection required and therefore implied and included as an adjunct and a necessary resource and proper mode of enforcing the powers, the authority to make the notes and certificates of indebtedness issued by the Government legal tender in payment of private debts incurred in commercial traffic as well as in the payment of public obligations—in other words, imparted the auxiliary power to make mere promises to pay actual payment of public and private indebtedness!

This conclusion was reached, as stated by Mr. Justice Miller, on the assumption that if the power had not been exercised "the National Government would have perished, and, with it, the Constitution which we are now called upon to construe with such nice and critical accuracy;"¹ or, in the

1. 8 Wallace, 633.

language of Mr. Justice Strong, for the reason that "It certainly was intended to confer upon the Government the power of self-preservation;"¹ or, as more energetically expressed by Mr. Justice Bradley, because it is "a power which, had Congress failed to exercise when it did, we might have had no court here today to consider the question, nor a Government or a country to make it important to do so;"—"Every Government has a right to demand this when its existence is at stake."² The general tenor of the reasoning in these opinions on which the final decisions relating to legal tender rested affords an astonishing illustration of the limitless range of exploitation of methods, and the extreme laxity of recognition, or application of the principles of constitutional interpretation that may be indulged, to sustain a predetermined political or governmental policy. Stripped, however, of all extraneous circumlocution, the real basis of extenuation for the result reached in these opinions was, that the legal tender provisions were assumed to be indispensable to enable the Government to raise the necessary funds to crush the rebellion and preserve the Union.

Within six years after these decisions were announced the same justices as members of the Electoral Commission, in a case involving the fraudulent usurpation of the reins of Government of the United States, veered to the opposite extreme of constitutional interpretation and resorted to the strictest construction possible, of an express provision of the organic law, which imposed in terms upon the two Houses of Congress the mandatory duty of counting "the votes of *the electors*" actually chosen in the presidential election; and either ignoring the momentous issue of an executive usurpation dependent upon the proper performance of the duty, or compassing such an untoward result, held that the two Houses were

1. 12 Wallace, 533.

2. 12 Wallace, 561-2.

bound to count the votes of fraudulent claimants presenting false certificates, as such electors, even though they knew such claimants had been defeated at the polls, and that the inclusion of their votes would inaugurate a practical usurpation of the Presidency.

THE JUDICIARY PROPER SUBJECTS OF CRITICISM.

Other instances of lesser note might be referred to in support of the position that the court, under the present method of appointing its members, has failed at intervals to maintain its independence. But it is not deemed necessary to pursue this inquiry further. If the suggestion be made that criticisms of judicial errors and frailties tend to lessen the authority of the court and to diminish the respect and deference of the people for our institutions, and are therefore to be deprecated, the decisive answer is that it is better to probe the evil before it becomes permanent and irremediable, and that judges who are really susceptible in the performance of their judicial functions to popular applause or partisan censure, or subject to the domination and ascendancy of stronger minds in public or private life, especially in the other governmental departments, are not worthy of public homage or esteem. There is no place in the Government of a free and intelligent people for the doctrine of the inviolability of the judiciary.

PARTISAN MOTIVES THE PREVAILING RULE IN THE APPOINTMENT OF JUDGES.

When the practically unlimited power of the executive and legislative departments in the initiation of governmental pol-

icies and direction of the details of administration, together with their exceptional means of appealing to and obtaining popular approval and support of their measures, are considered in connection with their joint control of the organization of the court and the appointment of its members, it is not surprising that some of the judges were not disinclined upon special occasions, perhaps unconsciously, to recognize the claims of political partisanship in their judicial action. That personal and partisan motives usually prevail in making judicial appointments is abundantly verified by an almost unbroken line of precedents since the first organization of the court. There have been instances undoubtedly of excellent appointments made from partisan motives, as when the elder President Adams accepted the resignation of Oliver Ellsworth as Chief Justice, and sent to the Senate the name of John Marshall as his successor; and when President Jackson nominated Roger B. Taney as the successor to Chief Justice Marshall. In each instance it so happened that the appointee was an intellectual prodigy as well as an adroit politician, and as such had rendered effective service to the administration; but these are eminent exceptions to the usual outcome of the rule. Ordinarily when the President and the senatorial majority were members of the same party the claims of political aspirants received recognition without question in recompense for partisan service, although they had no particular legal qualifications for the bench;¹ and these considerations, unless the executive had been a distinguished member of the bar of large experience in the courts, or was specially imbued with the paramount importance of judicial fitness and availability, which was rarely the case, were likely to, and in the clash of opposing interests usually did, control the appointments. The best results were generally obtained when the

1. President Taft has been an exception to the rule.

executive differed in political faith from the greater number of senators. He was then compelled to nominate unexceptionable candidates in order to secure their confirmation by the Senate. Another serious barrier to the impartial selection of judges is the singular rule of "senatorial courtesy," which has enabled a single senator to defeat excellent nominations from his own State upon the sole ground of his personal hostility to the candidates.

There are numerous precedents of senatorial action in support of these views. Even in the time of the first President, his nomination of John Rutledge as Chief Justice was rejected by the senate on the sole ground of his opposition to the ratification of the "Jay treaty,"¹ which had been made a party question. The President, who strongly favored the treaty, was too broad minded to regard this difference of opinion upon a question of foreign policy, but his immediate supporters, led by Alexander Hamilton, induced the Federalist majority in the Senate to vote against the confirmation, and succeeded by a partisan vote in defeating the appointment. The nomination also of Roger B. Taney by President Jackson as an associate justice was rejected by the partisan opposition only the year before his name was sent to the Senate for the office of Chief Justice, and solely for the reason that he had as Secretary of the Treasury required the removal of the deposits of all public money from the Bank of the United States. His confirmation the next year as Chief Justice was obtained because in the meantime a change had occurred in the political complexion of the Senate; and even then the opposition polled their full vote against him including the names of such intellectual giants as Webster, Calhoun and Clay.

1. The Jay treaty, so-called, had been negotiated abroad with the English government by Chief Justice Jay, as American Minister, and was strongly opposed by Jefferson and his adherents as inconsistent with our national interests.

President Grant, upon the death of Chief Justice Chase, nominated George H. Williams, Caleb Cushing and Morrison R. Waite, respectively, to succeed him as Chief Justice. Williams, who was attorney general at the time, and Cushing, who was one of the most accomplished and proficient jurists of his generation, and especially an expert in constitutional and international law, having been for that reason employed as confidential adviser of the state department during the Civil War, were both rejected by the Senate,—Cushing probably because it was feared from his political antecedents that he would incline to leniency toward the wayward sister States in the construction of the Constitution, and the reconstruction acts of Congress,—although both of them were in full sympathy at the time with the political majority in the Senate. Roscoe Conkling, then a member of the Senate, was also tendered the appointment, and would undoubtedly have been confirmed if he had not declined the honor. He was an eloquent advocate and a powerful debater in Congress, but he was too much of a partisan and too little inclined to minute and laborious research in the law as a science to have made a great reputation on the bench. Mr. Waite, as the last nominee for the vacancy, was finally confirmed as Chief Justice, and presided over the court for eighteen years, achieving the reputation of a wise, discreet and able magistrate.

Many other instances of senatorial bias and unfairness in rejecting judicial nominations might be given, but it will suffice to refer to two more which occurred in filling the vacancy caused by the death of Mr. Justice Thompson in 1844. President Tyler's first nomination was John C. Spencer, one of the most profound and efficient lawyers of his time, who was endowed with mental characteristics specially fitting him for service on the bench, and whose political predilections were in unison with the senatorial majority; but with Mr. Webster

he had given umbrage to his partisan associates by remaining in the cabinet after the President renounced his allegiance to the party in power, and was rejected for that reason. The President then nominated Reuben H. Walworth, whose judicial career commenced in 1823, as circuit judge in New York, from which position he was promoted in 1828 to that of Chancellor. He had retained the latter office as the successor of Chancellor Kent, and discharged its duties to the entire acceptance of the public until his nomination to the office of associate justice. The Senate, however, delayed for so long a period to take any action upon the nomination that the President withdrew it and sent in the name of Samuel Nelson, who was confirmed. The erudite and experienced Chancellor had been so unfortunate as to intimate in one of his judicial opinions a sentiment adverse to the institution of slavery; and common rumor at the time proclaimed that this was the sole reason for the omission of the Senate to act, and for the President's withdrawal of the nomination.

Another insuperable ground of objection to the present method of appointing the judges is the danger of vesting in the President any authority over the organization of the judiciary. The President, as the main depositary of the executive power, has general supervision and control of the domestic and foreign policy of the Government; and his administration of public affairs frequently involves important questions of constitutional law, which have not been passed upon by the court. These questions become the subjects of earnest and even passionate discussion in the Halls of Congress and in the public press, and the President naturally comes to be a zealous partisan in support of his policies. He would be more or less than man, if he did not during his continuance in office designate to fill the vacancies that occurred in the court, ardent supporters of his political policies. The annals of judicial appointments are replete with examples of this charac-

ter. The President, in his solicitude to name unconditional adherents of his administration, may be comparatively unmindful of the requisite legal qualifications of a judicial magistrate; and it has repeatedly happened that appointments have been made of members of the court who were unsuited to the position.¹

MANY ABLE AND SEVERAL PREEMINENT JUDGES IN THE COURT.

A fair proportion, however, of its members, since its organization, have been capable men in and out of their profession, and on the bench. They have, as a rule, been willing and efficient upholders of the Constitution and the laws. The chief justices particularly were renowned citizens and able and effective co-workers with their associates in the administration of justice; and three of them were preeminent for mental acumen, power of logical induction and generalization, legal learning, professional and political experience, and especially for aptness, discernment and ability in the exercise of their judicial functions. The first three chief justices were noted for purity of character, untarnished integrity and superior intelligence displayed in other spheres of the public service, two of them also in extended service as judges in their respective State tribunals; but their continuance in active service on the bench of the Supreme Court was of such

1. John Quincy Adams did not hesitate to write in his *Memoirs*, July 10, 1835, in commenting on the death of Chief Justice Marshall that he was "a Federalist of the Washington school. The associate judges from the time of his appointment have generally been taken from the Democratic or Jeffersonian party. Not one of them, excepting Story, has been a man of great ability. Several of them have been men of strong prejudices, warm passions, and contracted minds; one of them, occasionally, insane." 9th Vol. 243. Mr. Adams was presumably acquainted with all these justices, one of whom, not Story, was appointed by him.

short duration that none of them has left a notable impress upon the National system of jurisprudence.

The fourth chief justice was a unique personage, who became a profound political philosopher, a sagacious statesman, a consummate constitutional lawyer and a great judge, indeed one of the three most distinguished and illustrious judicial magistrates that have appeared in Great Britain or the United States. His transcendent ability enabled him to trace the probable intentions of its authors through all the mazes of uncertainty occasioned by the use of terse, vague, equivocal and even obscure expressions resorted to in the general phraseology of the Constitution,—an instrument not inaptly described as composed in lieu of definitions of merely an enumeration of powers and duties—and to evolve and establish for permanent use a rational and feasible method of interpreting its provisions. By the proper application of these rules of interpretation,—developing its tentative suggestions and reducing them to practice, elaborating and applying its theories to concrete cases and thus converting them into realities, and adjusting its postulates to the unforeseen and unexpected conditions and entanglements of private, industrial and public affairs, presented in the rapid growth of the Nation—he substantially completed the framework of a novel governmental scheme; so that we have exhibited to mankind a composite structure of republican government in such thoroughly workable condition, as to have successfully withstood, for more than a century, not only the usual tests of normal advancement and administration, but also the most difficult and tremendous strains of vast territorial expansion, of appalling internal convulsions and civil war, and of the enormous influx and marvellous assimilation of foreign immigration, resulting in the unexampled increase of our population from three million to ninety million souls. Chief Justice Marshall presided over the sessions of the court thirty-four years,

and during that entire period was an indefatigable student of the organic law, a keen observer of its practical operation in governmental affairs, and constantly employed in hearing and deciding cases at law and in equity involving a critical examination, accurate interpretation, and effective application of its provisions to private transactions and public undertakings and events; and on the whole his opinions as the leading and probably the dominant mind in the court are, after the lapse of more than three-quarters of a century, still received and regarded as the surest and best expositions of the great charter of our General Government. Some of these opinions will be the subject of frequent comment in subsequent chapters of this work, not in every instance with unstinted approval; but his opinions taken collectively doubtless form the clearest, ablest, most comprehensive and profound explications that have been given of the several provisions to which they relate of the Constitution. No one can scrutinize and ponder these amazing exhibitions of dialectical reasoning and not be "lost in admiration at the strength and stretch of the human understanding." And this chief justice will undoubtedly be remembered and regarded by succeeding generations as the most imposing and authoritative oracle of the Constitution.

His immediate successor, Chief Justice Taney, was a prodigy of legal learning. He remained at the bar until nearly sixty years of age, devoting himself, except during the short period he was at the head of the treasury, to a most extensive practice, in which he met, on equal terms, the leading lawyers of his time, and then presided over the deliberations of the court for twenty-eight years. He was acknowledged by his contemporaries to be more familiar with the details of professional practice and the rules and principles of general jurisprudence than any of his predecessors. He was also an adept in constitutional law. Although, like Marshall, an original

Federalist, he was more inclined than his predecessors to recognize the general rule of constitutional interpretation which upheld the reserved rights of the States as against the General Government. This difference in their views was plainly disclosed and emphasized at the first term of the court after his appointment. Three cases had been argued at the last term over which Marshall presided, involving the constitutionality of statutes of the States of New York, Rhode Island and Kentucky, and in each of these cases the Chief Justice had expressed his opinion against their validity, but rearguments were ordered because the judges differed in their opinions. In each of these cases the new Chief Justice disagreed with his predecessor and concurred in affirming the validity of the statutes, notwithstanding the vigorous dissent of Mr. Justice Story, who delivered an elaborate opinion in each case; and that distinguished judge was so dismayed at the conclusions embodied in the decisions that he seriously contemplated retiring from the court. Chief Justice Taney delivered the opinion of the court in the most important case and this opinion has since been accepted with general approval by the bar and bench as the settled law on the subject. His opinions in many other leading cases are masterly discussions of the questions presented and fully confirm his reputation as a powerful reasoner and a great judge. He is entitled to the exceptional distinction of having demonstrated and corrected a grave judicial error of Chief Justice Marshall in one of the earlier decisions of the court concerning the admiralty jurisdiction of the Federal tribunals beyond tide water in the great lakes and continental rivers. His unfortunate judicial attitude, however, in the case of Dred Scott, although his opinion in that case, as an intellectual effort, is not surpassed by any judicial argumentation in the history of the court, subjected him to such bitter and unrelenting criticism as to render his later days too pathetic and painful for special comment.

The next Chief Justice also reached the goal, not of his ambition, but of his destiny, when rapidly approaching sixty years of age. He had been an exceedingly able lawyer and successful politician, and had demonstrated his superior ability as a financier and statesman, having always proven equal to the various and successive responsibilities of his long and active career. No man ever assumed a heavier burden in a great national emergency than was imposed upon Salmon P. Chase, when President Lincoln selected and the Senate confirmed him as Secretary of the Treasury in 1861. If Hamilton laid the foundation of our financial policy, Chase in the exigencies of civil war relaid it to a greater depth and breadth and established it on a firmer footing than before, evoking in the throes of apparent National dissolution the confidence and credit of the financial world. He thus enabled the Government to incur in addition to the immense sums realized from direct and indirect taxation an indebtedness of over three thousand million dollars, with which to prosecute the momentous struggle for the rehabilitation of the Union under the Constitution to a triumphant termination.

During the period of nine years that he remained on the bench, he conducted the business of the court with unimpaired dignity and efficiency and absolute impartiality. Many new problems of constitutional law, arising out of the events and results of the civil war and the re-establishment of local governments under the reconstruction acts of Congress in the southern States, were brought before the court and determined, and in these cases he delivered nearly all of the prevailing opinions, evincing profound knowledge of governmental principles and rules of action, and the most sagacious views of statesmanship, as well as an accurate understanding of the scope and bearing of the Constitution upon the novel conditions and circumstances presented for his consideration. It was in one of these cases involving the effect

of a formal withdrawal or secession of a State from the Union that he announced the dictum which has since been accepted as a fundamental axiom, that "the Constitution in all its provisions, looks upon an indestructible Union composed of indestructible States." His imperturbable judicial candor and impartiality was thoroughly tested and confirmed by his famous opinions in the legal tender cases, in which after the restoration of peace, upon a careful re-examination of the subject in the calm seclusion of judicial inquiry and "in trembling obedience to the mandates of the Constitution," he unhesitatingly condemned, as ineffectual and void, the provisions of the statute to which, in the midst of the excitements and commotions of the Civil War, and as a provisional expedient for the preservation of the Union, he had given his reluctant assent. But the most difficult and delicate duty he was called upon as Chief Justice to perform, was that of "presiding" over the sessions of the High Court of Impeachment for the trial of President Johnson. This service was required by the Constitution, and as it is the only instance in the history of the Republic of such an impeachment he was obliged to explore, without chart or compass, the undeveloped range and extent of this extra judicial function appertaining to his office, and by his rulings to designate its proper confines and point out the course to be pursued in future cases of the same character. That the Chief Justice performed his arduous and perplexing duties in that unprecedented conflict of opposing and unrelenting political forces, conducted under the forms of law, with absolute fairness and signal ability, was the general, if not the universal verdict of the friends and foes of the President, and of all his contemporaries.

It would be uncandid not to add that there have also been a considerable number of distinguished jurists in the list of associate justices of the court, among whom may be included James Wilson, William Johnson, Joseph Story, Levy Wood-

bury, Benjamin R. Curtis, and John A. Campbell, not mentioning those who have honored the bench since the opening of the Civil War. Indeed, there is, on the whole, no sufficient ground of criticism of the appointments as a body made since the General Government was organized with reference to the discharge of their duties in the ordinary administration of justice. The general average of the judges in ability and learning have been quite equal to, if not above, the average standard of members of the bar, and the decisions of the court since its organization in the course of constructing a system of general jurisprudence, will compare favorably with those of the courts of last resort in the several States and in England or any other country. Moreover, the decisions of the Supreme Court, even in political cases in which the Government or administration has an interest, or in cases involving governmental policies, will equally admit of comparison with those of the same character of the highest tribunals in foreign lands. It may not be amiss, however, to add that all the courts in European nations are not presupposed to be entirely exempt from executive or legislative control or influence.

ESSENTIAL CONDITIONS OF JUDICIAL INDEPENDENCE.

The essential requisite of complete independence of the judiciary is its absolute separation from the other governmental departments in its origin and organization, as well as its jurisdiction. It therefore especially behooves the judges under the present method of appointment to exercise the strictest vigilance in observing the exact boundary line of judicial authority and activity prescribed by the Constitution; and while declining to cross in any event the line of separation thus marked out between the judiciary and the other departments, to assert with unrelenting pertinacity the authority

of the court to invalidate any and every effort on the part of Congress or of the executive to encroach upon or to enter within the confines of the judicial power. The President in making nominations to the Senate usually selects supporters of his administration and its policies, and if the working majority of that body is in political accord with the executive the appointees take their seats on the bench predisposed to sustain all governmental measures of a partisan character initiated by the same party, or to oppose those of the opposite party, which may become the subjects of litigation and be assailed as repugnant to the Constitution. This tendency is not lessened and may unwittingly be fortified by the grateful sentiments entertained by the recipients of the honors thus conferred toward the political source of the appointments.

Unfortunately several members of the court have failed to recognize their judicial obligations in this respect. They have occasionally accepted appointments in the diplomatic service while retaining their seats upon the bench, and have thus rendered themselves incompetent to act, or at least presumptively incapable of acting impartially in subsequent legal controversies involving the results of their diplomacy. The first and third Chief Justices received appointments as envoys extraordinary to represent the Republic abroad in negotiating treaties with foreign nations, submitting themselves to the direction and control, and acting as subordinates of the executive in important matters of state. Such action of the first Chief Justice in accepting a special mission to England is the more remarkable from the fact that he and his associates had previously declined to advise the executive department concerning "questions depending for their solution on the construction of treaties, on the laws of nature and of nations, and on the laws of the land," upon the distinct ground, as stated by the Chief Justice, that "the lines of separation drawn by the Constitution between the three departments of

the government" were in certain respects checks upon each other, and these "considerations afforded strong arguments against the propriety of the judges of a court in the last resort extra-judicially deciding the questions alluded to."¹ The Chief Justice had in the year of his appointment presided at the circuit court in Richmond, Virginia, upon a trial "involving the question whether British debts were recoverable under the treaty of 1783, where acts of that State, passed prior to the adoption of the Constitution, prohibited their recovery,"² so that his judicial experience had reminded him of the jurisdiction of the court to hear and determine cases in which the "construction of treaties" as well as the laws of nations and of the land might become important points in dispute. Moreover, the validity of a treaty may at any time come before the court for adjudication. "It need hardly be said that a treaty cannot change the Constitution or be held valid if in violation of that instrument. This results from the nature and fundamental principles of our Government."³ The "Jay Treaty" aroused more intense and general indignation and encountered more energetic opposition than any other diplomatic event since the organization of the Government. The gentle, refined and courtly Chief Justice, whose name had been a synonym for sincerity, uprightness and honor in private and public life, became the subject of the coarsest personal abuse and the most atrocious calumnies in every hamlet and neighborhood of the land. Doubtless the surprise and vexation caused by this harsh and unmerciful treatment by his countrymen, which would naturally have detracted from his usefulness on the bench, was an element in his reaching the conclusion announced shortly after his re-

1. Letters of Secretary of State and Chief Justice, 3 Correspondence and Public Papers of John Jay, 486-9.

2. 3 Id. 486.

3. The Cherokee Tobacco, 11 Wallace, 616, 620-1.

turn to this country, to resign the Chief Justiceship and accept the office of Governor of New York, to which he had been elected during his absence and before the contents of the treaty were made public.

Notwithstanding this painful experience of his predecessor, the third Chief Justice was induced, a few years later, to accept a similar appointment as envoy to France, and continued nearly a year afterward to act as a member of the court before departing upon his mission; and then retained his high judicial office nearly another year while engaged in negotiating the treaty. His health in the meantime had become so impaired as to render him unable to perform the onerous service of attending the circuits, then imposed upon all the members of the court, and accordingly without further delay he forwarded his resignation of the office of Chief Justice, and remained in Europe several months after completing his diplomatic task, for rest and recuperation.

The fourth Chief Justice, after receiving his commission, retained for more than a month his former position and continued to perform his duties as secretary of state, and during the same period actually presided at the February Term of the Court in 1801. He probably justified this proceeding as a temporary expedient of little or no practical importance, because an entire change of administration had been at the prior fall elections authorized and new officials chosen to wield the executive and legislative powers of the Government on the succeeding 4th of March. Still, it was a perilous "case in point" to present from such an influential and authoritative source for subsequent imitation in similar cases.

The associate justices have likewise been occasionally designated to represent the government diplomatically at important junctures of public affairs. Mr. Justice Nelson was appointed in 1871 a member, with four others, of the Joint High Commission to act with five commissioners of Great Britain

in negotiating a treaty concerning several subjects of controversy between the two Nations. He was engaged several months in these negotiations while retaining his judicial position. Mr. Justice Brewer also was appointed and acted in 1897 as one of the commissioners on behalf of the United States, as assertor of the Monroe Doctrine, in conjunction with commissioners of Great Britain and Venezuela to settle the disputed boundary line between the latter country and the colony of British Guinea. And he was afterward (1899) appointed one of the arbitrators under the treaty made by the commission and confirmed by the powers in interest, to determine and establish the boundary line, and acted accordingly. He then resumed his service on the bench. Mr. Justice Harlan had previously (1892) served as one of the arbitrators in Paris to determine the Behring Sea controversy between Great Britain and the United States.

There is no necessary inconsistency in a member of the court consenting at the request of his Government to act as an arbitrator of an international issue of law or fact, as his service in such a case would be strictly of a judicial character. But the acceptance by a judge of a diplomatic mission involves merely the performance of an executive duty and places him under absolute control of the political administration in passing upon questions which may subsequently come before the court for judicial determination. In such an event he cannot be entirely indifferent, as he is committed by his prior official action in favor of the treaty provision, or of the interpretation maintained by his own superior in the negotiation. Nor, after having subjected himself to the dictation of the other governmental departments as their representative or agent in negotiating the treaty, is his independence as a judge beyond criticism. He is not insensible to the compliment contained in his selection for the special service, and will not unnaturally feel inclined to retain a grateful recollection of the recognition he received in an international negotiation, so that he is perhaps unconsciously bereft of that independence

and self-reliance so essential to the proper support and preservation of the judiciary as a co-ordinate department of the Government. No member of any court is considered competent to sit in a case involving the validity or interpretation of a written instrument which had previously been prepared by himself in a business transaction, as an attorney for one or both of the parties in interest; and the same reason is conclusive against the propriety of his disqualifying himself from acting judicially in a case involving the constitutionality or meaning of an international treaty. The executive has been quite inclined, especially on critical occasions or in matters of doubtful consonance with the Constitution, to select senators and members of the court, including those of opposite politics, as the negotiators on behalf of the Government, confidently trusting that their official action as such representatives would exert a controlling influence in procuring subsequent confirmation of the treaties by the Senate, and, if involved in litigation, their final approval by the court.

EXISTING DEFECTS IN ORGANIZATION OF THE COURT, AND AMENDMENT SUGGESTED TO THE CONSTITUTION.

The foregoing examples of judicial subservience or helplessness and consequent failure on great occasions to fulfill reasonable expectations of freedom from external influence clearly indicate that the existing organization of the National judiciary is far from perfect, and needs amendment, if it is to accomplish its especial purpose of serving as an effectual check upon the other governmental departments,—a purpose it can only serve by interdicting them from exceeding their powers, or restraining them within their proper spheres under the Constitution. The most serious, if not a fatal constitu-

tional defect, is the omission to prescribe in terms the number of members of which the court should be composed, or some definite rule by which the number can be ascertained and determined, as in the provisions relating to the Senate and House of Representatives. Under the present system the executive can in conjunction with Congress, by the simple legislative expedient of increasing the number of associate justices, and appointing well-known partisans or supporters of administrative policies, procure at any time decisions of approval *ad libitum* of any measures. Doubtless such an extreme course would not be resorted to, except in important crises of public affairs, but it is in these crises that the protection and preservation of private rights and public interests require unqualified obedience in spirit and in truth to the fundamental law. It was therefore exceedingly unsafe and indiscreet as the event has proved, to assume that no concurrent action of the executive and Congress could be brought about to effect the reorganization of the court for the special purpose of preventing or procuring a particular decision in a particular case or class of cases. Political parties or their agencies when in power rarely hesitate to resort to the most extreme expedients to carry out their policies in the management and control of governmental affairs. A constitutional amendment designating the number of judges would enable the court as thus permanently organized to protect itself at least against all legislation calculated to influence or affect its decisions, except in so far as deaths or resignations might introduce new appointees to fill the vacancies.

To ensure, however, the independence of the court, the judges, like the executive and members of the two Houses of Congress, should be chosen either directly or indirectly by the people. The general rule now prevailing in the States is to choose the judges by direct vote of the electors at the regular elections of State officers; this method has resulted in the se-

lection of judges equal on the average to those still designated in a few of the old States by appointment. Thus in New York, where all the members of all the courts have been selected since 1848 by popular vote, the judges of the Court of Appeals certainly furnish a comparison favorable in learning, ability and character, with those of any other court in the country, including the Supreme Court of the United States. The only exception to this result under the elective system is in the choice of local judges in the great cities, where it must be conceded, that the percentage of incompetent and unfit selections has been so large as to render the method to that extent a failure. But these local exceptions would have no controlling influence in National elections, or in elections extending over a considerable expanse of territory like a judicial circuit of the United States. The fact, however, must not be overlooked, that weak and incapable judges have occasionally under the system of appointments crept into the very highest courts and doubtless will continue to do so under any system that may be devised.

If a popular choice by indirection be preferred, as by an election of judicial electors with power to select the judges, this method is also practicable and preferable to the present system, as it would be effectual to secure the independence of the court from the interference of the other governmental departments. A given number of electors could be authorized, one from each State to be chosen at a State election or by the legislature, or two or three electors from each circuit of the United States to be chosen at the elections or by the concurrent action of the legislatures of the States composing the circuit, or even the whole number chosen together as a body, like the presidential electors at the presidential or congressional elections,—to serve for stated periods of ten or fifteen years, and to meet at regular intervals, or upon special occasions when certain vacancies have occurred, three-quarters of

the entire number to constitute a quorum, and two-thirds of those present to execute the power of selection. This method would be quite as feasible as the present system of choosing the President or the senators or members of the House of Representatives, and would prove quite as effectual and efficient as the method of appointments now in force.

If, however, the methods above suggested be considered too drastic or dangerous, as likely to arouse and promote political preferences rather than judicial qualifications for judicial service, a more conservative course remains, which would be a decided improvement upon the present method of allowing the executive unlimited discretion in the selection of nominees for the bench. Whenever a judicial appointment is required to be made, the House of Representatives could be authorized and required to name, say, eight persons to the President for the position, to be selected as follows: five from the party represented by the majority of members and three from the party represented by the minority in the House; and the President should be limited to these persons in making his nomination to the Senate for confirmation. This method is in force in the Kingdom of Holland, and has given general satisfaction.

There can be no objection to including in the Constitution a permanent organization of the court, consisting of a fixed number of judges. Experience has clearly demonstrated that seven or nine members are as many as can render useful or efficient service in a judicial tribunal—unless it is severed into two or more separate bodies; and such associate sections or divisions of equal jurisdiction have never proved satisfactory to the bar or the bench, or to the public, as a court of last resort. In that respect the present system of an intermediate Court of Appeals is far preferable.

CHAPTER II.

JURISDICTION.

The jurisdiction of the Supreme Court is granted and in general terms described in the Constitution.

CONSTITUTIONAL PROVISIONS.

The General Government is divided into three departments, legislative, executive and judicial, and a separate article is devoted to each department. By the first article "all legislative powers herein granted" are ceded to the Congress; by the second "the executive power" is conferred upon the President, and by the third "the judicial power" is vested in "one Supreme Court, and in such inferior courts as the Congress may, from time to time, ordain and establish."

The judicial power is then extended "to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens or subjects."¹

The last clause in the grant of judicial power relating to controversies between a State and citizens of another State,

1. Art. III, secs. 1 and 2.

or citizens or subjects of any foreign State, was amended in 1796, by excluding a suit or prosecution by or on behalf of such citizens or subjects against any State of the Union. This amendment, known as Article XI of the Constitution, provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

There are, moreover, a few other express reservations from the judicial power, which are withheld from the judiciary and conferred upon the two Houses of Congress. Each House is made the sole "judge of the elections, returns and qualifications of its own members," and is enabled to "punish its members for disorderly behavior, and, with the concurrence of two-thirds, to expel a member." These special grants of power to each House of Congress were deemed necessary to maintain the independence of the legislative department, and do not interfere with the usual or general exercise of the judicial power by the courts.

The House of Representatives is also entrusted with "the sole power of impeachment," and the Senate likewise with the sole power "to try all impeachments." But the Chief Justice is designated and required to preside on the trial of the President. It is, however, further provided, that "judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law."

The cases of impeachment and actions by individuals against a State are, therefore, the only substantial exceptions authorized from the grant of judicial power to the Supreme

Court, and an impeachment is hardly an exception. Even where a public officer has been impeached, convicted, removed from office and disqualified to hold any office thereafter, he may nevertheless be prosecuted in the courts and punished to the same extent as other criminals for similar offences.¹

The other exception relative to suits against a State by citizens of another State or foreign citizens or subjects, did not originate in any diversity of opinion concerning the court as a judicial tribunal, but may be attributed largely to the prevailing sentiment of State sovereignty, which was then dominant in the southern portion of the Union, and which indeed remained dominant until after the Civil War. It was insisted that a sovereign State could not submit to the indignity of an involuntary appearance in a suit in compliance with legal process issued against it at the instance of an individual, and be compelled to litigate a claim which it had ignored or repudiated. The Court, however, overruled this contention, and held, under the general grant of jurisdiction, that an action by a citizen could be maintained against a State, and his legal rights enforced by judicial process;² and this decision resulted in the adoption of the eleventh amendment. A State, however, cannot escape from all liability under this amendment. Another indirect method of enforcing a valid claim of a citizen of one State against another State has been applied with complete success. The personal claim may be transferred by gift or sale to the State of which the citizen is a resident and then prosecuted in the name of the State directly against the debtor State.³

1. Art. I, sec. 1, sub. 5; sec. 2, sub. 6; sec. 5, subs. 1, 2.

2. *Chisholm v. Georgia*, 2 Dallas R. 419.

3. *South Dakota v. North Carolina*, 192 U. S. 286-7.

NO EARLIER EXAMPLE OF SUCH A TRIBUNAL.

There was no precedent for a judicial tribunal of such transcendent jurisdiction. From the earliest ages courts of justice had been subordinate to the executive power or to the executive and legislative powers in the State. In absolute monarchies they were the creatures of executive fiat, and in constitutional countries they were subject and submissive as a rule to the executive or to the executive and the legislature conjoined. The monarch was regarded as the fountain of justice, and therefore not in bondage to the law nor amenable to the judicial power. Even in England the Lord Chancellor is still presumed to be the keeper of the King's conscience, from which he derives his inspiration in administering relief in equity; and the common law judges, in exercising their functions, are regarded as the personal representatives of the sovereign. Indeed, the principle permeating the present system of judicature in the country from which we received the great body of our civil and criminal law is crystallized in the maxim that the king can do no wrong.

We have outgrown this superstition. All governmental power in this country is derived from the people, and the highest as well as the lowest public officers are merely public servants and must, except in cases of impeachment, answer as persons and officers for their acts and defaults, in the courts of justice.

THE COURT FINAL ARBITER OF CONSTITUTIONAL QUESTIONS.

The several departments of the Government it is true are within their respective spheres equal and independent. Each department, in the routine exercise and performance of its functions, must in the first instance determine for itself the

limitations of its power. But as the judicial power is in terms described as including "all cases arising under the Constitution, the laws of the United States, and treaties" with other nations, it follows that whenever a case arises in law or equity between proper parties, involving the constitutional validity of executive or legislative acts, the Supreme Court is empowered as the final arbiter to determine whether they are valid or void; and such determination is thenceforth the law of the land. The determination of such a question depends upon the legal interpretation of the constitutional provisions relating to the governmental powers of the different departments under the Constitution and the exercise of this function is clearly a judicial, as distinguished from an executive or legislative power.

This view of the nature and extent of the judicial power, in its special application to Constitutional law, has been largely reiterated in acts of the Congress and reenforced by numerous decisions of the court, running through a period of more than a hundred years. These decisions indeed present an unbroken line of judicial authorities beginning in 1803 with the famous judgment of Chief Justice Marshall in *Marbury vs. Madison*¹ to the effect "that an act of Congress repugnant to the Constitution cannot become a law;" and the executive and legislative departments have finally yielded their assent to this primordial principle in our form of Government. No judge or jurist could now be induced to regard it as an open question.

There have, however, appeared in recent years in legal and literary periodicals very confident and zealous efforts of certain theorists to undermine this elementary rule of interpretation of the constitutional provisions on this subject. The principal grounds of these strictures are (1) that there is no express grant of this power to the court in the Constitu-

1. 1 Cranch. 137, 174-80.

tion; and (2) that the convention rejected all proposals to confer upon the executive and the judiciary the right of revision, i. e., authority to examine and approve or reject all projects of legislation. These latter proposals, however, contemplated a reconsideration of the bills rejected by one or both of the revisers and their subsequent repassage by two-thirds or three-fourths of both Houses of Congress, when they were to become complete legislative acts or laws.

The first ground of objection is an evident misapprehension, as the jurisdiction is clearly conferred upon the court to pass upon the constitutionality of a statute or treaty or a governmental act. The "judicial power" is in terms vested in the Supreme and inferior courts, supplemented by an express provision that this power shall extend to "*all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made under their authority.*" The fundamental rule of judicial action is then prescribed as follows: "*This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made under the authority of the United States, shall be the Supreme law of the land.*"¹ As stated by Chief Justice Marshall, in *Marbury vs. Madison*,²

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If

1. Art. VI, sec. 2. The claims of several critics and of one or two judges in the State tribunals that it was not the real intention of the framers of the Constitution to confer this power on the courts, or that there is ample historical proof that the great majority of its framers never suspected that a general power of the judiciary to control legislation could be interpreted into the new Constitution, are completely refuted and overthrown by Professor Beard in his recent excellent essay on the Supreme Court and the Constitution, pp. 15-67. See also, Dougherty's still more recent work on the Federal Judiciary. *Passim*.

2. 1 Cranch, 176.

two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution * * * the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty."

The Supreme Court must, therefore, determine in the end whether a given law is, or is not, made pursuant to or in conformity with the Constitution. The second ground of objection is irrelevant and ineffective. The right to revise acts of Congress as proposed was a part of the legislative power, and was a qualified or corrective veto; it was not restricted to constitutional aspects but related as well to the general form, phraseology and policy of legislation with reference to existing statutes and rules of the common law. On the other hand, the right to determine whether acts of Congress, the validity and effect of which are involved in litigations at law or in equity, are in harmony with or in contravention of the Constitution, is an exercise of the judicial power, and, if the decision is adverse, operates as an absolute veto which renders the formal statute utterly void. The adoption or rejection of statutory revision as a function of the executive separately or conjointly with the members of a judicial tribunal has no bearing either for or against the jurisdiction of the court to pass upon the validity of laws under the Constitution, as both powers may be, and have been, so conferred and have been exercised by the same judiciary. The first Constitution of the State of New York, adopted in 1777, created a council of revision, composed of the Governor, Chancellor and Justices of the Supreme Court, and conferred upon it the power to revise all the statutes, and to approve or disapprove them on constitutional or other grounds; and it required all bills disapproved by the council to be reconsidered and passed by a two-thirds vote of both houses of the legislature.¹ Ac-

1. 1 Lincoln's Const. Hist. of New York, 165.

cordingly during a period of forty-five years, the Governor, Chancellor and Judges acted as statutory revisers, and the courts repeatedly adjudged statutes which had been revised, then reconsidered and passed by the legislature to be in conflict with the Constitution.¹ Persistent efforts were made in the convention of 1821 to retain the council of revision in the new Constitution, but the public impression induced by experience was too strong to be overcome, that the revisory duty of general legislation by the judiciary was incompatible with the theory of co-ordination in the governmental departments and inconsistent with the retention of the calm and serene temperament essential to the proper performance of the judicial function, as it developed a marked tendency in the judges to enlist in political controversies,—and the council was therefore rejected. It is, however, a proposition too plain for discussion, that a new, or an amendment to an old, statute, should before its final adoption be submitted to the criticism of legal and legislative experts, who should have a permanent tenure as public officers under the general supervision of the Attorney General. Their intimate acquaintance with the history of the common law and of legislation and their familiarity with the special rules and distinctions and technical terms relating to the immediate subject, would in many if not in most instances, prevent the insertion or retention of legal incongruities and ambiguities in the statutes, and preserve the logical connection and consistency of the laws.

The continued exercise of this modern extension of the judicial power to pass upon the constitutionality of legislation is equally essential to the efficient administration of justice and to the maintenance of a uniform and consistent interpretation of the organic law. The lines of demarcation between

1. *People v. Foot*, 19 John. 57; *Baker v. People*, 20 John. 457, 459-61; *People v. Goodwin*, 18 John. 187-8, 201; *Gardner v. Village of Newburg*, 2 Johns. Ch. 162.

the executive and legislative powers on one hand, and the judicial power on the other, are clearly drawn, and their relative relations and limitations as traced in the Constitution, are coherent with and yet distinctive from, as well as complementary to each other.

The President and Congress act singly or jointly in their respective spheres: their several executive or legislative acts prohibit certain things and authorize or require other things to be done; in the case of an alleged violation in a litigation of these governmental acts, which are assailed as in excess of governmental authority, the judiciary necessarily interpret and apply to them as tests the provisions of the Constitution, and determine whether they are or are not warranted by that instrument. These governmental acts in connection with the acts of individuals lie at the foundation of all controversies in the courts concerning civil rights and responsibilities; and all the problems arising under the Constitution touching such personal and governmental acts of the contending parties, are directly involved in the judicial decision.

Another curious criticism has recently been put forward upon the novel theory that the interpretation of a statute is a legislative, not a judicial function. Doubtless the legislature may interpret the general language of a statutory provision, if such interpretation is embodied in the same act, as that is merely a qualifying provision indicating the real intention of the legislature in using the prior loose or indefinite phraseology, and is a proper exercise of its function in making the law, or in changing it, for future guidance. Such a provision is a part of the legislative declaration of what the law shall be considered by the courts in its application to future transactions. But the determination of what is the law at the time a given transaction took place is in the strictest sense a judicial function; and the exercise of this function necessarily involves an interpretation of any statute or clause

of the Constitution, which, in the decision of the case, is held applicable to and controlling of the matter in hand. The legal rule, however, is elementary that the legislature cannot by a subsequent act interpret the language of a prior statute, as this would be an *ex post facto* provision, prohibited by the Constitution. The legislature may amend a statute as to future transactions to meet or correct judicial interpretation, but cannot expound its meaning, as that is in its nature a judicial function. The fact that errors have been committed by the legislature and by the courts in the exercise of their several functions does not affect or tend to transform their inherent and essential qualities, or to unite them together.

If there were no constitutional limitations upon legislation, if the President and Congress were in the exercise of their functions under no restraint except that of public sentiment, if, indeed, our only fundamental law were an act of Congress, passed in a national emergency, doubtless the courts would be concluded by the provisions of a legislative act. The Constitution, however, which brought into being the executive and legislative powers, also prescribed their limitations, and extended the judicial power to all cases arising under its provisions.

The court of last resort, as the ultimate expounder of the organic law, is, therefore, in all matters concerning the constitutional limitations of their powers, the supreme monitor and guide of all the governmental departments. Any executive or legislative act may injuriously affect a personal or corporate, or a State or National right, and, as the subject of litigation, confer jurisdiction upon the court to determine its validity or nullity; and in the latter event the effect of the decision is to render the act in question *eo instanti* ineffectual and void. Moreover, the decision becomes a judicial precedent to be subsequently observed and followed in all public and private affairs. The Court is, therefore, in the incidental

exercise of its jurisdiction, if fearlessly and faithfully exerted, a capital check upon the executive and legislative departments.

THE CONSTITUTION, ORIGINAL AND ONLY SOURCE AND AUTHORITY OF THE JUDICIAL POWER.

The Constitution included all the powers of the General Government under three grand divisions, legislative, executive and judicial, and vested the judicial power in the Supreme Court and such inferior courts as should be established by act of Congress. This is the first instance in the history of nations of a distinct line drawn in the distribution of governmental powers.

The granting clause of the judicial power, as originally reported to the constitutional convention, proposed that "the jurisdiction of the Supreme Court shall extend" to the particular cases and controversies and the parties mentioned; but the clause was changed in the final draft to read as follows: "The judicial *power* shall extend," i. e., stretch or reach out to and include all the classes of litigation designated, even if beyond the ordinary range of judicature. This change was apparently made to exclude the inference that the enunciation of particular cases or controversies should have the effect of limiting the jurisdiction of the court. This clause in connection with the first part of the preceding section, vesting the "judicial power of the United States" in the supreme and subordinate courts, operated as an express grant of the whole power of judicature pertaining to the Federal Government, with the extension to and inclusion of the several classes of cases specified in the Constitution, subject only to the exceptions expressly reserved as to impeachments and the ex-

clusive jurisdiction given to each House of Congress over its own members.¹

The distinction between the legislative and the judicial powers, as we have seen, is fundamental. The former is exerted to make or amend laws for future guidance, and the latter is exercised to determine rights under existing laws—to interpret the laws in force and apply them to particular facts and circumstances. The executive power is employed to enforce the laws as expounded by the judiciary. The same rules govern the distribution of powers concerning the adoption or amendment and the interpretation and determination of the force and effect of constitutional provisions, as well as their enforcement by the executive.²

1. A recent writer on this subject, whose opinions are entitled to great respect, has suggested a doubt whether the proper interpretation of these constitutional provisions amount to "a strict tripartite division" of the governmental powers. He says: "It places the executive power in the hands of the President, all the legislative powers which were granted by it in Congress, and the judicial power in certain courts; but it does not follow the earlier State Constitutions in declaring that whatever was vested in either of these three depositories was and must always be different in kind from that vested in any other of them." (*Baldwin's American Judiciary*, 18.) This was not necessary. The Federal Constitution created a new Government for certain purposes and delegated to it special powers, so that the exercise of its functions are limited to the affirmative or express grants contained in that instrument. On the other hand in several of the original thirteen States the Colonial legislatures had claimed and occasionally exercised the powers of appellate courts, setting aside the decisions of the legal tribunals. It was therefore thought proper to preclude all doubt, to prohibit in terms the further exercise of such jurisdiction by the State legislatures. The Supreme Court of Connecticut, however, has recently held, overruling an earlier decision, that even in a State Constitution, such a declaration or prohibition was unnecessary. (*Norwalk St. Co.'s Appeal*, 69 Conn. 576, 590-98; *Spencer's Appeal*, 78 Conn. 301, 304-6.)

2. "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law." (*Marshall, Ch. J., in Wyman v. Southard*, 10 Wheaton, 1, 46.) "The distinction between a judicial and a legislative act is well defined. The one

The grant of the judicial power to the courts does not prevent the executive or either House of Congress from instituting an investigation for the purpose of ascertaining facts to enable the particular power invoked to be properly put in action, but the inquisition must be restricted to a legitimate aim within the confines of the power, and be used solely as a basis for the exercise of executive or legislative discretion. An attempt by either of these departments to resort to this method to ascertain and determine the legal or constitutional rights or liabilities of particular parties under existing rules of action or standards of duty, would render the proceeding nugatory and void.¹ The judicial power, however, may be appealed to and exercised by the courts ancillary to the executive or legislative power, whenever it becomes necessary in an administrative proceeding or international commission or arbitration instituted under a statute or treaty to render it effectual against a party contesting its authority, or adversely whenever its methods or conclusions are sought to be reviewed by parties whose legal rights are affected; and such appeals are "cases" or "controversies" within the meaning of the Constitution.² The same rule applies to the review of a decision of the Commissioner of Patents in granting or refusing an application for a patent.³ In these and similar

determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Whenever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such act is to that extent a judicial one, and not the proper exercise of legislative functions." (Field, J., in *The Sinking Fund Cases*, 99 U. S. 700, 761.)

1. *Kilbourne v. Thompson*, 103 U. S. 108-9, 182, 189-200.

2. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447-9, 475-89. *Same Commission v. Baird*, 194 U. S. 26, 35-9; *La Abra Mining Co. v. U. S.*, 423-4, 455-63.

3. *U. S. v. Duell*, 172 U. S. 576-7, 582-9.

cases the proceedings partake preliminarily and chiefly of an administrative character, but incidentally involve the disposition of personal or property rights which require the exercise of judicial discretion and action to conclude the parties in interest.

CHAPTER III.

JURISDICTION CONTINUED.

The Court cannot be deprived by legislation of its appellate jurisdiction.

“The Supreme Court alone possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it.”¹ This announcement was made by Chief Justice Fuller in 1906, in connection with a particular reference to the general extension of the judicial power, embraced in the jurisdiction conferred upon the Supreme Court, quoting also a similar statement of Mr. Justice Johnson in 1812, contained in an opinion of the court. It may be questioned whether these judicial declarations were intended to include its appellate, as well as its original jurisdiction. Assuming, however, that such was the intention of the learned judges, it was sound doctrine. But the point was not involved in either of those cases, both of which related exclusively to the jurisdiction of the circuit courts. The recognition and enforcement of this doctrine, as applicable to its appellate power, is indispensable to the dignity, authority and independence of the Supreme Court.

The Constitution, after vesting in the court the judicial power, further provides, (1) that its original jurisdiction shall include all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, and (2), that the court, in all the other cases mentioned in the extension of the judicial power, “shall have appellate jurisdiction, both as to law and fact, with such ex-

1. U. S. v. Hudson, 7 Cranch. 33; Ex parte Wisner, 203 U. S. 449, 455.

ceptions and under such regulations as the Congress shall make.”¹

To what extent is Congress authorized under the provision last cited to make exceptions to or regulations concerning the appellate jurisdiction of the court. Doubtless it may make “regulations” prescribing the practice to be pursued on all appeals from the lower tribunals. The more important question relates to the creation of “exceptions” to the jurisdiction of the court. The mandate of the Constitution is that the “court shall have appellate jurisdiction” in all the classes of cases mentioned in the extension of the judicial power, not included under the head of original jurisdiction, that is to say, it shall be vested with the power of ultimate review and final determination of all questions involved in each description of cases or controversies classified under or comprehended in the “judicial power;” so that no legal proposition shall be deemed irrevocably settled or determined until it has received the *ex cathedra* sanction of the court. Manifestly the power to make regulations and exceptions does not mean that Congress may divest the court of *all* the appellate jurisdiction so *clearly vested* in it by the Constitution; nor on the contrary that the parties to every case included in each subdivision mentioned as subject to its appellate jurisdiction shall have an absolute right to a writ of error or appeal to the court of last resort. The rights of litigants are to some extent subservient to the exigencies of public policy and the capability of the court to perform its functions. Exceptions may be created of comparatively unimportant cases, or of cases involving issues that have been previously determined by the court, or cases presenting familiar questions of common, commercial, equity and administrative law—provided a course is left open or a method is furnished

1. Art. 3, sec. 2, sub. 2.

by which the court may exercise its judicial discretion in permitting a review of such exceptional, unusual or peculiar cases as it may deem proper; but it cannot constitutionally be deprived of its appellate jurisdiction in any novel or specially important branch of legal controversy. In other words, Congress may make such exceptions to the right of reviewing particular cases as do not really deprive the court of its appellate jurisdiction in any of the categories named in the Constitution. The Congress may, indeed, regulate and except from, but cannot abrogate or revoke the grant of appellate jurisdiction; and the statutory exceptions, to be valid, must be consistent with the terms of the grant, which *ipso facto* vests in the court final jurisdiction of all the essential elements of appellatory judicature in each of the classes of cases mentioned in the organic law. The exceptions must be exceptional and special, and relate to and include only the relatively unimportant cases under the several heads of appellate jurisdiction; they must not in substance or effect annul, but rather confirm and prove the rule as contained in the grant of jurisdiction to hear and determine judicial controversies; especially those of first impression arising under the Constitution and the laws and treaties of the United States.

The judiciary act of 1789 which in its main features remained in force until 1891, was apparently intended to embody the regulations of procedure, and certain limitations of the appellate jurisdiction of the court, assumed to be authorized by the Constitution. This act created and organized three circuit and thirteen district courts, and gave to each court certain exclusive jurisdiction of and certain concurrent jurisdiction with the State courts; and also conferred certain concurrent jurisdiction upon the circuit and district courts, and moreover endowed the circuit courts with certain appellate jurisdiction over the district courts. The jurisdic-

tion given to the circuit and district courts included criminal as well as civil cases. The act also reaffirmed in part the constitutional grant of appellate jurisdiction to the Supreme Court, declaring in terms that it should have such "jurisdiction from the circuit courts and courts of the several States in the cases thereafter specially provided for;" and then provided for its exercise "in civil actions and suits in equity" by writs of error from judgments and decrees of the State and circuit courts, and in prize causes from those of the district courts, whenever the matters in controversy exceeded a stated amount. But the act omitted to mention otherwise or to refer in terms to any exceptions to the appellate jurisdiction of the court. By another special provision power was conferred upon all the courts to issue *writs of mandamus, habeas corpus, scire facias* and other writs agreeable to the principles and usages of law.¹

Chief Justice Marshall in an early case² gave the following interpretation to these statutory provisions:

"The appellate powers of this court are not given by the judicial act. They are given by the Constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed upon the subject. When the first legislature of the Union proceeded to carry the third article of the Constitution into effect, they must be understood as tending to exercise the power they possessed of making exceptions to the appellate jurisdiction of the Supreme Court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction and this affirmative description has been understood to imply a negative on the exercise of

1. There were of course other affirmative provisions in this and later acts relating to the review of decisions in particular cases or from special courts, or of specific questions by certificates of division of opinion of trial judges, which do not affect the point of the observations in the text.

2. *Durousseau v. U. S.*, 6 Cranch. 308, 314.

such appellate power as is not comprehended within it. * * * This restriction, however, being implied by the court, and that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears."

This interpretation, however, was an *obiter dictum*. The case did not involve an examination of the provisions in the judiciary act, but merely an interpretation of a clause of another statute creating the government and establishing a district court for the Territory of Orleans. The Territorial act created the district court "to consist of one judge," and then provided that "he shall in all things have and exercise the *same jurisdiction and powers* which are by law given to or may be exercised by the judge of (the) Kentucky district."¹ It was undisputed that the Kentucky court had in addition to the ordinary powers of a district court "jurisdiction of all other cases, except of appeals and writs of error, cognizable in a circuit court, and proceeded therein in the same manner as a circuit court; and that writs of error and appeals lay from decisions therein to the Supreme Court in the same cases as from a circuit to the Supreme Court, and under the same regulations."¹ The Kentucky court was accordingly given in terms all the statutory powers of a circuit as well as of a district court, excepting that of reviewing its own decisions as a district court. Nor was there any dispute that the Orleans court was given all the powers of the Kentucky court, both as a circuit and district court. The only question related to the jurisdiction of the Supreme Court, to wit, whether it had the same power of revision over the decisions of the Orleans court as it doubtless had over those of the Kentucky court. The answer to this question turned upon the construction of the clause in the organic act of the Territory

1. 2 U. S. Statutes 285, sec. 8.

1. Sec. 10 of Judiciary Act.

of Orleans declaring that the district judge should "in all things have the same jurisdiction and powers which were by law given or might be exercised by the judge of (the) Kentucky district." There was no allusion or suggestion in the Orleans act on which to hitch an implication concerning an appeal or writ of error from the decisions of the Orleans court to the Supreme Court—nothing but an express reference to the "jurisdiction and powers" of the Kentucky court as the standard and criterion of the powers of the Orleans court as a court of original jurisdiction. The reference in the Orleans act to the "judge of the Kentucky district" was distinctly limited to *his* "jurisdiction and powers," and did not include even inferentially the appellate powers given to the Supreme Court over the decisions of the Kentucky court. It was accordingly a case requiring the application of the rule recognized in the opinion of the Chief Justice that the appellate jurisdiction of the Supreme Court was derived from the Constitution; and as there was no statutory exception in force limiting its power to review the decisions of the Orleans court, the constitutional jurisdiction in that respect remained intact. The Supreme Court therefore had jurisdiction of the cause without reference to the general legislation in the judiciary act of 1789 concerning writs of error from the ordinary circuit and district courts as organized by Congress in the several States; and it was not claimed or suggested that these provisions had any application to the Territorial courts.

The jurisdiction conferred by the Constitution upon the Supreme Court was the entire "judicial power of the United States;" and the appellate branch of the jurisdiction was subject only to such exceptions and regulations as Congress was authorized to make. The old judiciary act did not attempt to legislate for any of the Territorial courts except by a special provision in section 10, which related exclusively to the Territories of Kentucky and Maine. There was no ad-

ditional legislation in the act organizing the Territory of Orleans limiting or affecting the appellate jurisdiction of the Supreme Court over the decisions of the Orleans district court, nor any other statutory provision relating to the jurisdiction of the district court than that mentioned by the Chief Justice. The Territorial Act declared that all that portion of the "territory and property of the United States" ceded to the United States by the French Emperor within certain designated boundaries, should constitute a Territory "under the name of the Territory of Orleans." It also provided for the appointment of a governor and council with full power of legislation over the Territory, with the restriction, however, subjoined, that "no law should be valid which was inconsistent with the Constitution and laws of the United States." It also provided that all Territorial legislation should be reported to the President and laid before Congress "and ordained that if disapproved of by Congress" it should "thereafter be of no force." The governor, judges, members of the council, and all other Territorial officers, were required to "take an oath or affirmation to support the Constitution of the United States." Moreover twenty-one public acts of Congress then in force in the United States were extended to and declared to "have full force and effect in the Territory."¹

The "judicial power of the United States," as an original proposition, is *ipso jure* co-extensive with the National domain, and the grant of appellate jurisdiction to the court includes the right to hear and determine in the last resort any case arising anywhere in the National territory involving the construction of the Constitution or the validity of any treaty or Federal statute, or the validity of any State Constitution or local law claimed to be in violation of the organic law of

1. U. S. Statutes 285 Ch.; Statutes of 1804.

the Union; and indeed any other case presenting a question of first impression in Federal judicature which is not embraced within its original jurisdiction. But even if the Constitution did not *ex propria vigore* extend to all the Territories, the provisions of the Territorial act of Congress distinctly brought the Territory of Orleans under its paramount authority, and subjected the Territorial district court and its judicial proceedings to the test of the "Supreme law of the land;" of which the Supreme Court is the authorized and only ultimate expounder. Chief Justice Marshall indirectly, if impliedly, recognized this condition of affairs in the Territory, and accordingly regarded the relation of the Supreme Court, under the Constitution, to the Federal circuit and district courts in the States and to the district court of Orleans as identical and as equally governed by the general legislation of Congress. All of these circuit and district courts were "ordained and established" by acts of Congress as "inferior courts" of Federal judicature, and were therefore vested with the "judicial power" within their Territorial limits, subject to such exceptions and regulations as were authorized by the Constitution.

The conclusion of the Chief Justice and the decision of the court in the Durosseau case were doubtless right, but the reasons given for the decision were clearly wrong and involved consequences which, in connection with other decisions, as will appear in the sequel, proved disastrous in one respect at least, to our system of government. It is therefore important to examine more in detail the reasons assigned for this decision.

It had been argued at the bar "that the words used in the law creating the court of Orleans describe the jurisdiction and powers of that court, not of this, and that they give no express jurisdiction to this court." He said in answer, that

"If the question depended singly upon the reference made in

the law creating the court for the Territory of Orleans to the court of Kentucky, the correctness of this reasoning would perhaps be conceded. It would be found difficult to maintain the proposition that investing the judge of the Territory of Orleans with the same jurisdiction and powers which were exercised by the judge of Kentucky, imposed upon that jurisdiction the same restrictions upon the power of a Superior Court as were imposed upon the court of Kentucky."

He then stated that the question did not depend singly on the reference in the Orleans act to the district court of Kentucky, because the powers of the district courts for the States of Tennessee and Ohio in the acts organizing those courts "were described in the same terms with those which describe the powers of the court of Orleans." And he asked, as if the questions were unanswerable in any other view than he maintained :

"Can it be conceived to have been the intention of the Legislature to except from the appellate jurisdiction of the Supreme Court all the causes decided in the western country, except those decided in Kentucky? Can such an intention be possible? Ought it to be inferred from ambiguous phrases?"

These questions assume that there had been no prior difference of opinion concerning the necessity or propriety of such affirmative legislation. Congress may have omitted specific provisions for appeals to the Supreme Court in each of those acts as unnecessary, because the appellate jurisdiction was conferred in the Constitution. That there was no patent ambiguity in the phrases used in the foregoing acts in referring to the powers of the Kentucky court is evident from the admission of the Chief Justice that "if the question depended singly upon the reference made in the" Orleans act it would furnish no sufficient basis for an inference concerning the appellate jurisdiction of the Supreme Court."

Does, then, the mere fact that in prior acts the same references were made in identical phraseology to the Kentucky court, authorize or permit an implication not warranted by their use in a single instance? Was the linguistic force of the same words used in the same connection and for the same purpose in prior acts increased by simple repetition? The Chief Justice properly disclaimed giving any force to the circumstance that the court had "taken jurisdiction of a cause brought by writ of error from Tennessee" because in that case "the question was not moved" and therefore "remained open."¹ The counsel may indeed have assumed that the appellate jurisdiction was unassailable under the Constitution. The point had been mooted and conflicting opinions expressed by the judges in *Wiscart v. D'Auchy*,² but it was not involved in the case.

1. *U. S. v. More*, 3 Cranch. 159, 172; *Louisville Trust Co.*, 191 U. S. 225, 236.

2. 3 Dallas, 321. That was an equity case and came before the court on a writ of error from the circuit court for the district of Virginia. The action was brought to set aside conveyances of real and personal estate of the debtor, alleged to have been fraudulently made to avoid payment of his debts. The trial court found that the conveyances were fraudulent and void as against his creditors, including the complainants. There was no dispute concerning the appellate jurisdiction of the court, and the decision hinged upon the singular provision in the judiciary act authorizing an equity case to be brought up for review by a writ of error rather than by an appeal. Two propositions were discussed and decided by the court, (1) that the record of the case contained a sufficient statement of the facts found by the trial court, and (2) that this statement was conclusive, and precluded a re-examination of the evidence for the purpose of reviewing the findings of fact. This result was reached on the theory that a writ of error only presented questions of law, which as a general proposition was doubtless correct. If the appealing party intended to raise the constitutional question, he should have appealed under the chancery practice, which would, if sustained, have entitled him to a review of the decision below on the law and the facts.

But Chief Justice Ellsworth, the reputed author of the judiciary act, naturally sensitive concerning criticisms of his handiwork, was not content with deciding the question of practice, and enlisted in a general discus-

Nor did a latent ambiguity arise from a comparison of the terms of the reference in the Orleans act with those of the references in the other acts concerning the district courts of Ohio and Tennessee to the Kentucky court, or with the entire provision contained in the Kentucky act, or with the pertinent provisions of the Constitution. The particular terms of limitation in the references of the Ohio and Tennessee acts to the Kentucky court and the accurate repetition of those terms in the Orleans act, instead of raising an ambiguity strongly emphasized the exact reach and extent of the restriction of each of those references in the several acts as

sion of the question whether an appeal would have lain if it had been resorted to, and concluded that it would not. He said: "If Congress has provided no rule to regulate our proceedings we cannot exercise our appellate jurisdiction; and if the rule is provided we cannot depart from it. The question, therefore, on the constitutional point of an appellate jurisdiction, is simply whether Congress has established any rule for regulating its exercise.

* * * It is observed that a writ of error is a process more limited in its effects than an appeal; but whatever may be the operation, if an appellate jurisdiction can only be exercised by this court conformable to such regulations as are made by the Congress, and if Congress has prescribed a writ of error and no other mode, by which it can be exercised, still, I say, we are bound to pursue that mode, and can neither make nor adopt another. The law may, indeed, be improper and inconvenient; but it is of more importance for a judicial determination to ascertain what the law is, than to speculate upon what it ought to be." (3 Dallas, 327-8.)

Mr. Justice Wilson, apparently foreseeing the consequences of such a course of reasoning, dissented from this view. Referring to an appeal in equity as distinguished from a writ of error, he said: "Such an appeal is expressly sanctioned by the Constitution; it may, therefore, clearly, in the first view of the subject, be considered as the most regular process; and as there are not any words in the judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Even indeed, if a positive restriction existed by law it would in my judgment be superseded by the superior authority of the constitutional provision. * * * It is true the act of Congress makes no provision on the subject; but it is equally true that the Constitution (which we must suppose to be always in the view of the legislature) had previously declared that in certain enumerated cases * * * the Supreme Court shall have appellate jurisdiction,

including only the powers of the Kentucky court and excluding those of the Supreme Court on appeal. *Exclusio unius est exclusio alterius*.

Finally all doubt or uncertainty was removed by collating the terms of the reference in the Orleans act with the phraseology of the Constitution. A latent ambiguity is only produced when the language of one document, the meaning of which is obvious on its face, is rendered doubtful or obscure by a reference to and comparison with a different form of expression or incongruous provision in another document. But the Constitution is perfectly clear and consistent with the reference in the Orleans act to the Kentucky court, as it in

both as to law and fact, with such exceptions and under such regulations as the Congress shall make. The appellate jurisdiction therefore flowed as a consequence from this source, nor had the legislature any occasion to do what the Constitution had already done. The legislature might, indeed, have made exceptions and introduced regulations upon the subject; but as it has not done so the case remains upon the strong ground of the Constitution, which in general terms and on general principles provides and authorizes an appeal; the process that in its very nature implies a re-examination of the fact, as well as the law. This construction upon the whole presents itself to my mind not only as the natural result of a candid and connected consideration of the Constitution and the act of Congress, but as a position in our system of jurisprudence essential to the security and dignity of the United States." (3 Dallas, 325-7.) This decision was made in 1796. The statute, however, was amended in 1803, to authorize appeals to the Supreme Court in equity and admiralty cases, where the matter in dispute exceeded the same amount as in other cases, but subject to the same rules, regulations and restrictions as in reviews by writs of error. (2 U. S. Statutes, 214.) Since this amendment the court has entertained appeals, not only in equity and admiralty cases, but in special proceedings bearing very slight, if any, resemblance to a suit in equity. (U. S. v. Circuit Judges, 3 Wallace, 673-6.) And under a later act passed in 1875 (18 U. S. Statutes, 315), making the findings of fact in admiralty cases conclusive, and limiting the reviewing power of the court "to a determination of questions of law arising upon the record" it was held that only rulings of the trial court upon legal propositions could be reviewed by a bill of exceptions. (The *Abbotsford*, 98 U. S. 440.) In a still later case the act was held to be constitutional. (The *Francis Wright*, 105 U. S. 381.)

terms confers appellate jurisdiction upon the Supreme Court over any and all tribunals that may be constituted by act of Congress; and the Orleans act creates no exception and indeed contains no allusion to the exercise of this appellate jurisdiction.

If, however, it be conceded that the affirmative provisions in the judiciary act, providing for the allowance of writs of error from the circuit courts to cases in which the matters in dispute exceeded a stated sum, created by implication exceptions to that extent to the appellate jurisdiction of the Supreme Court, still those provisions under the prior decisions of the court had no application to Territorial courts of any description subsequently organized unless made so by special reference in the Territorial acts, and if so made the application was limited and controlled by such special statutory provisions. But the Chief Justice, in the absence of any reference whatever, and therefore without any indication of the intention of Congress on the subject, assumed that such an intention must have existed and accordingly implied the intention of the legislature "to place those courts precisely on the footing of the courts of Kentucky, Ohio and Tennessee in every respect, and to subject their judgments in the same manner to the revision of the Supreme Court." There was in fact no legislation on the subject of reviewing the judgments of other Territorial courts, and the reasons assigned in the opinion for the decision were in view of the distinction claimed and recognized in earlier decisions between States and Territories plain judicial legislation. This course, however, was deemed unavoidable, as it was announced that "otherwise the court of Orleans would in fact be a Supreme Court." But that result could have been remedied by an amendment of the organic act of Orleans at the next session of Congress. It will not escape notice that the court in another case¹ had not permitted the same reasons to influence

1. *Clarke v. Bazadone*, 1 Cranch. 212.

its decision. There was no affirmative or negative allusion in the Territorial act to an appeal from the "general court" of the Northwestern Territory established by an ordinance of the old Congress under the Confederation and confirmed by an act of Congress under the Constitution, and therefore no hint of an intention to limit or restrain the exercise of the appellate jurisdiction of the Supreme Court in respect to that Territory. In that case the Territorial Court had rendered a judgment for an amount far exceeding that required in the judiciary act to give the Supreme Court appellate jurisdiction; but the court refused to hear the case "on the ground that the act of Congress had not authorized an appeal or writ of error from the court of that Territory." The Territorial court was accordingly recognized as a "Supreme Court" and its decisions held to be final "although from the manifest errors appearing on the face of the record the judges felt every disposition to support the writ of error" in the general interests of justice. No opinion was delivered in that case, and the opinion in the Durosseau case was undoubtedly written and published to explain the discrepancy between the decisions and to silence further judicial discussion.

A few years later the case of *Martin v. Hunter's Lessee*¹ came before the court. In that case the Court of Appeals of Virginia had refused to obey the mandate of a former decision of the Supreme Court reversing the decision of the State court and requiring such reversal to be carried into effect. The refusal of the State court was founded on the claim that the provision in the judiciary act authorizing an appeal from its decision in such a case was in contravention of the Constitution and therefore invalid. The decision of the appeal accordingly involved the true interpretation of the Constitution conferring appellate jurisdiction upon the Supreme Court. The opinion was delivered by Mr. Justice Story.

After quoting the article relating to the judiciary, he said :

“ The language of the article throughout is manifestly designed to be mandatory upon the legislature. Its obligatory force is so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. The judicial power of the United States *shall* be vested (not may be vested) in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. * * * The judicial power must, therefore, be vested in some court by Congress ; and to suppose that it was not an obligation binding on them, but might at their pleasure be omitted or declined, is to suppose that under the sanction of the Constitution they might defeat the Constitution itself ; a construction which would lead to such a result cannot be sound. * * * If, then, it is a duty of Congress to vest the judicial power of the United States, it is a duty to vest *the whole judicial power*. The language, if imperative as to one point, is imperative as to all. If it were otherwise this anomaly would exist, that Congress might successfully refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all ; for the Constitution has not singled out any class on which Congress are bound to act in preference to others. * * * The next consideration is as to the courts in which the judicial power shall be vested. It is manifest that a Supreme Court must be established. * * * The Supreme Court can have original jurisdiction in two classes of cases only, * * * and if in any of the cases enumerated in the Constitution, the State courts did not then possess jurisdiction, the appellate jurisdiction of the Supreme Court (admitting that it could act on State courts) could not reach those cases, and consequently the injunction of the Constitution that the judicial power ‘ shall be vested ’ would be disobeyed. It would seem, therefore, to follow that Congress are bound to create some inferior courts in which to vest all that jurisdiction which, under the Constitution, is exclusively vested in the United States, and of which the Supreme Court cannot take original jurisdiction. * * * It is declared that in all the cases affecting ambassadors, etc., that the Supreme Court shall have original jurisdiction. Could Congress withhold original jurisdiction in these cases from the Supreme Court ? The clause proceeds, ‘ in all the other cases before mentioned the Supreme Court shall have appellate jurisdic-

tion, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.' The very exception here shows that the framers of the Constitution used the words in an *imperative* sense. What necessity could there exist for this exception, if the preceding words were not used in that sense? Without such exception Congress would by the preceding words have possessed a complete power to regulate the appellate jurisdiction, if the language were only equivalent to the words 'may have' appellate jurisdiction. * * * It being then established that the language of this clause is imperative, the question is as to the cases to which it shall apply. The answer is found in the Constitution itself; the judicial power shall extend to *all* the cases enumerated in the Constitution. As the mode is not limited it may extend to all such cases, in any form in which judicial power may be exercised. It may, therefore, extend to them in the shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other. * * * It will be observed that there are two classes of cases enumerated in the Constitution between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws and treaties of the United States, etc. * * * In this class the expression is that the judicial power shall extend to all cases; but in the subsequent part of the clause * * * the word 'all' is dropped, seemingly *ex industria*. * * * In respect of the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to *all cases*; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate. The vital importance of all the cases enumerated in the first class to the national sovereignty might warrant such a distinction. * * * All these cases then enter into the national policy, affect the national rights, and may compromise the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and of course should extend to all cases whatsoever." ¹

1. 1 Wheaton, 328-35.

The court accordingly maintained its jurisdiction under the Constitution to entertain the appeal from the judgment of the State court, and approved its former decision reversing that judgment. It is evident that the author of this opinion was hampered in his interpretation of the constitutional provisions relating to the jurisdiction of the court by the earlier opinion in the Durosseau case. To elude the reasoning of the Chief Justice in that case, Mr. Justice Story was driven to adopt the strained construction of the Constitution that affirmative legislation was necessary, and then to hold that an imperative duty was imposed upon Congress by such legislation "to vest the whole judicial power" in the Federal judiciary. In this view, if Congress refuse or omit to perform the imperative duty is there any remedy? As the court cannot dictate to Congress in the sphere of legislation, there certainly is none to enforce performance. Can the court then assume that Congress, despite its omission to act, has really done what it ought to have done, so that jurisdiction has actually vested in the court? This would seem to be the rational, if not the necessary implication from the reasoning of the court. Such an inference, however, would involve a double violation of the organic law: (1) on the part of Congress in repudiating a constitutional obligation, and (2) on the part of the court in holding that despite the power of Congress and its omission or refusal to act, the court may be, and accordingly is, *ipso facto* vested with "the whole judicial power." But this would be nothing more or less than judicial usurpation. If it be true that an act of Congress is necessary to vest the constitutional jurisdiction in the court, the conclusion is inevitable that a refusal of Congress to perform that duty must result in a governmental deadlock; as it is indispensable to their co-ordinate union that the several branches of the government continue in active and efficient co-operation.

Fortunately such a catastrophe may still be avoided. The reasons given in this as in the *Durosseau* case were wrong while the decisions were right. Judge Story himself designated the way of escape in calling attention to the identical language of the Constitution in granting their several powers to each of the governmental departments, showing that each of them received its authority directly from the fundamental law, and not from the intermediate action of Congress. He said :

“ The same expression ‘ shall be vested ’ occurs in other parts of the Constitution, in defining the powers of the co-ordinate branches of the Government. The first article declares that ‘ all legislative powers herein granted shall be vested in a Congress of the United States.’ Will it be contended that the legislative power is not absolutely vested ? That the words merely refer to some future act, and mean only that the legislative power may hereafter be vested ? The second article declares that the executive power shall be vested in a President of the United States of America. Could Congress vest it in any other person ; or is it to await their good pleasure, whether it is to vest at all ? It is apparent that such a construction in either case would be utterly inadmissible. Why, then, is it entitled to a better support in reference to the judicial department ? ” ¹

This argument is unanswerable, but was not pressed for the obvious reason that the final conclusion would have been inconsistent with the doctrine of the Chief Justice in the *Durosseau* case. If, then, upon the organization of the executive and legislative departments the executive power vested automatically under the Constitution in the executive and the limited legislative power in Congress, the conclusion is unavoidable that the judicial power, original and appellate, also vested in the Supreme Court as soon as it was organized.

Despite, however, this incidental adverse criticism of Mr.

1. 1 Wheaton, 329-30.

Justice Story, the *obiter* opinion of the eminent Chief Justice in the Durosseau case accomplished its purpose, and laid the foundation of a practical rule of interpretation of the constitutional provisions relating to the appellate jurisdiction of the court, followed without further inquiry or discussion for more than a hundred years, and this *obiter* opinion transferred in effect the grant of appellate power from its original source in the Constitution to the affirmative legislation of Congress, and limited its exercise to such *legislation* as completely in the Federal tribunals at Washington and the States as in the Territories of the United States. Thenceforth it was indispensable in order to invoke the jurisdiction of the Supreme Court and induce it to review a decision of any inferior court, to point to an express statutory provision granting the power. That opinion, indeed, required the court as a co-ordinate department of the Government to exercise its appellate jurisdiction absolutely under the dictation and domination of the other departments. Thus in 1847 Chief Justice Taney declared in delivering its unanimous judgment that "the Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress."¹ In another case in 1852 Mr. Justice Curtis, concurring with a majority of the judges, said: "This court has appellate power only in the cases provided for by Congress."² The same view was reiterated in nearly the same words by Chief Justice Waite, speaking for all the judges in 1876.³ Again in 1881, Chief Justice Waite as the organ of the court in a case involving the right to review a disputed question of fact, said

"that while the appellate power of the court, under the Constitution, extends to all cases within the judicial power of the United

1. Barry v. Mercein, 5 Howard, 119.

2. In re Kaine, 14 Howard, 120.

3. U. S. v. Young, 94 U. S. 259.

States, *actual* jurisdiction under the power is *confined* within such limits as Congress sees fit to prescribe. * * * Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals, * * * but the one as well as the other brings into action the appellate power of the court. What those powers shall be, and to what extent they shall be exercised, are and always have been proper subjects of legislative control. * * * Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not.”¹

And in 1892, after the repeal of the judiciary act of 1789, and the enactment of the judicial act of 1891, Mr. Justice Gray, with the concurrence of his associates, referring to the old and new acts, said :

“This court, as it has always held, can exercise no appellate jurisdiction except in the cases, and in the manner and form, defined and prescribed by Congress.”²

And finally in 1909 in a case involving the jurisdiction of the court to hear a criminal case, Mr. Justice Day, delivering its unanimous decision sustaining the writ of error, said :

“The appellate jurisdiction in the Federal system of procedure is purely statutory. For many years it did not exist in criminal cases. It has been granted by statute in certain cases; and criminal cases, in which are involved a deprivation of constitutional rights, may be brought to this court by writ of error, under section 5 of the Court of Appeals Act.”³

The Constitution on the contrary vested the judicial power of Federal judicature directly in the Supreme and inferior courts; and, after referring in general terms to the several

1. The Francis Wright, 105 U. S. 381, 385-6.

2. American Construction Co. v. Jacksonville Ry., 148 U. S. 378.

3. Heike v. U. S., 217 U. S. 428.

classes of cases to which the power was extended, including all suits in law and equity arising under the Constitution and the laws and treaties of the United States, and mentioning particular parties to and special subjects of litigation, clearly designated and set apart the appellate jurisdiction of the Supreme Court. But in view of the limited working capacity of the highest judicial tribunal, and of the probable growth and expansion of the Republic, its prospective increase in population, wealth and other resources, and the constant accession and extension of human endeavors and pursuits in new and ever unfolding spheres of industry and enterprise, the Congress was authorized to make such exceptions to the exercise of this general appellate jurisdiction of such trivial and unimportant cases as would relieve the court from the pressure and strain of excessive service, and not disable it to accomplish the ulterior purposes of its creation. This could readily have been done by the organization of inferior appellate courts and a partial transfer to them of jurisdiction in the several classes of cases to which the judicial power was extended in a manner consistent with the retention of those of a novel character or of greatest importance by the court and of its ultimate and complete supremacy, as the only tribunal created by the Constitution. The judiciary act of 1789, however, as practically interpreted, not only made exceptions but stripped the court of its appellate jurisdiction specially conferred upon it by the organic law. It was essential to the uniformity of legal procedure and adjudication, and to the independence of the court as a co-ordinate governmental department, that it should retain and exercise the power of final determination of all constitutional principles concerning personal or property rights, or governmental or legislative acts, incidentally presented in actual litigation, without reference to the pecuniary interests involved. But the old judiciary act limited the exercise of the appellate juris-

diction of the court to "civil actions" and accordingly as interpreted deprived it of the power of reviewing decisions of the Federal courts in criminal cases.¹ That such cases, however, were clearly "suits at law" and were embraced in the terms of the grant of judicial power, had been repeatedly adjudged by the court; but it was held nevertheless that the affirmative legislation granting jurisdiction in "civil actions" operated as an exception and divested the court of all power to intervene in criminal cases. The imposition of a pecuniary limitation upon the exercise of appellate jurisdiction in civil actions also occasionally resulted in preventing the court from passing upon questions of the highest importance, as in cases affecting rights of merely nominal value it may and does occur that great constitutional principles are involved. The Constitution made jurisdiction in the classes of cases mentioned the general rule, and merely authorized Congress to make exceptions to the rule. But the judiciary act and the judicial construction it received transformed the exceptions and recognized them as forming the rigid rule and exclusive test of appellate jurisdiction, so that it became necessary in order to induce the court to review the decision of an inferior court to produce express statutory authority in every instance.

There was, perhaps, a seeming excuse for making this exception applicable to criminal cases, as it had not been customary in the English courts to allow writs of error or appeals except in civil actions. But it cannot be assumed in view of the guaranties of personal rights contained in the various provisions of the Constitution, and of the fifth, sixth, eighth, thirteenth, fourteenth and fifteenth amendments, that it was ever contemplated that the Supreme Court should be deprived of the power of interpreting these great guaranties,

1. *Tennessee v. Davis*, 100 U. S. 258, 265.

or of determining the highest constitutional rights of citizens in criminal prosecutions. Suppose there had been a conviction in the case of Aaron Burr, or that the indictment against Jefferson Davis had been brought to trial and had resulted in his conviction; those cases involved all the conceivable aspects and elements of the crime of treason as defined in the Constitution and acts of Congress. They were clearly "cases in law * * * arising under the Constitution and laws of the United States," and were "controversies to which the United States was a party," and were distinctly included in the constitutional extension of the "judicial power" conferred upon the Supreme Court. Is it to be assumed that it was the intention that cases of this character, presenting such momentous issues of constitutional and statutory law, could not, because of the implied or even the express direction of Congress, be re-considered and definitely decided by the highest tribunal in the land? President Johnson escaped conviction on the trial of his impeachment before the Senate by a single vote; if that vote had been obtained he would have been removed from his great office and been subject to indictment for the high crimes and misdemeanors alleged against him and the prosecution of the indictment would have involved the decision and demarcation of the boundaries between the executive and legislative powers of the Government, as prescribed in the Constitution. Is it possible that the Supreme Court was by legislation legally deprived of the jurisdiction conferred upon it by the Constitution of reviewing in such a case the decision of the trial court, or of any intermediate appellate court, affecting so powerfully the public peace and safety, and presenting such grave and vital issues of constitutional government?

The main objection to the statutes and to the decisions of the court concerning the source of its appellate jurisdiction is, not that its power to review the decisions of inferior tri-

bunals is not now as broad and extensive as it ought to be to enable the court to maintain its proper position in our political system, but that this jurisdiction is recognized as derived exclusively from the legislation of Congress, and is therefore subject to be limited or hampered or even revoked and entirely withdrawn in the discretion and exercise of the executive and legislative powers. The dignity and independence as well as the authority of the court can only be safeguarded against the insidious efforts of political agitators or the encroachments of co-ordinate departments in the Government by its own judicial determination in the last resort, that the veritable source of all its appellate jurisdiction is the Constitution; and that this jurisdiction cannot be limited by legislation so as to deprive the court of its right to the final review of all constitutional questions in the different classes of cases included in the extension of the "judicial power" as defined in the organic law. That the other governmental powers will not scruple, in great political crises, to interpose and prevent the judicial condemnation of their revolutionary measures, and to that end to limit or even to abrogate by legislation this jurisdiction under the Constitution is evident from past events in their history to which attention will hereafter be directed. It is equally evident, from the novel methods pursued in very recent times by the promoters of exceptional political policies and from the visionary tendencies of their partisan organizations, that actual civil commotions are by no means necessary to induce large bodies of people under the lead of influential citizens and aspiring politicians to engage in anomalous and even unconstitutional methods to accomplish the same results. It has become quite the fashion for ambitious politicians in and out of office to resort to various expedients to arouse the passions of the multitude concerning some unfavorable and unexpected development of public policy or an unfortunate event in the ad-

ministration of National affairs, and then, under the spur of popular agitation and in evasion of their own proper responsibility, to advocate and adopt a drastic or amorphous measure of relief from the evil, which is generally so crude and imperfect or unreasonable as to be ineffectual, or is so clearly in collision with national or state-rights or other public or private interests as to clash directly with the Constitution; so that it cannot be sustained or sanctioned by the court. And when the inevitable result is accordingly reached of a failure of the remedy, the popular antipathy is adroitly averted from the guilty parties and concentrated upon the innocent tribunal of last resort.

It is incumbent upon the court to assert and maintain its constitutional prerogatives, an obligation it has usually performed with signal vigor and resolution when openly assailed, but which in this instance concerning its appellate jurisdiction it failed to discern or recognize at the outset, and consequently omitted to vindicate until this singular rule of interpretation became so generally sanctioned and firmly established as to become and remain for more than a century the settled policy of the Republic. It is true that Chief Justice Marshall stated in his opinion in the *Durousseau* case, that "the appellate powers of the court are not given by the judicial act," and "are given by the Constitution." But he nevertheless distinctly applied a special statutory provision in the first judiciary act in terms only applicable to appeals from two then existing courts in Maine and Kentucky to an appeal from another court in Orleans, not in existence when the judiciary act was passed, and of course not mentioned or referred to in it, or embraced within its general terms, by a forced implication based upon a strained construction of an incidental clause of the later Orleans statute concerning the jurisdiction of a newly created court in that Territory, which contained no suggestion or intimation of an appeal

from the decision of the latter court; and ignored entirely the grant of power in the Constitution, which, if recognized and applied, would have enabled and required him to announce the same conclusion. In substance and in fact the Chief Justice by this circuitous course of reasoning in that case treated the judiciary act and not the Constitution as the source of the jurisdiction of the court; and he only consented to entertain the writ of error and review the decision as the result of this unusual method of argumentation. This method he evidently regarded as necessary to bring the case within the special provision of the judiciary act, and therefore within the appellate jurisdiction of the court. In subsequent cases arising under later legislation and tried in newly organized tribunals the court literally followed the same conclusion; and in the absence of some affirmative statutory provision allowing it, invariably refused to exercise its appellate jurisdiction.

It must be conceded that this procedure was consistent with the adoption by the court of the general rule of interpretation of the judiciary act and the acts relating to the Federal district courts of the States of Ohio and Tennessee. But if Congress under the guise of making exceptions could require the Supreme Court as a general rule to point to an affirmative statutory grant of appellate jurisdiction, or in particular cases to a special grant of power in every instance, or if Congress could by a statutory provision take away the appellate jurisdiction of the court in criminal cases or in any class of cases enumerated in the Constitution, it inevitably follows that it can deprive the court of all its appellate jurisdiction and organize other appellate courts and transfer to them all the appellate powers of judicature, leaving the Supreme Court to the exercise solely of its original jurisdiction under the Constitution.

The court accordingly relinquished to that extent its rank as a co-ordinate department of the government; and it was subsequently obliged to endure the humiliation of a distinct rebuff from the Congress, which arbitrarily and offensively assumed to divest it of appellate jurisdiction in a particular case pending before it for adjudication by repealing the act under which it had determined to exercise the power. As early as 1807 the court decided in accordance with the rule more distinctly formulated and explained afterward in the *Durousseau* case, that under the grant of power contained in section 4 of the judiciary act, it had jurisdiction to review by a writ of *habeas corpus* and *a certiorari* the decision of a circuit court committing persons to prison who were charged with the crime of treason.¹ The material part of the statute provided

“that all the before-mentioned courts (including the Supreme Court) shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not especially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeably to the principles and usages of law; and that either of the justices of the Supreme Court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of and inquiry into the cause of commitment.”

In the *Bollman* case, Chief Justice Marshall stated the rule as follows:

“The inquiry will be whether by any statute, compatible with the Constitution of the United States, the power to award a writ of *habeas corpus* in such a case has been granted to the court.”

And after reaching from an examination of the statute an affirmative conclusion concerning that source, he added:

1. *Ex parte Bollman*, 4 Cranch, 75, 100, 107.

“ If the Act of Congress gives the court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the Constitution.”

The last inquiry having also been answered in the affirmative the Chief Justice held that the court was only qualified to exercise an appellate power, and in this manner distinguished the case from that of *Marbury v. Madison*.¹ The latter case was an application to the court for a writ of mandamus to compel the secretary of state to deliver an executive document, alleged to be an appointment of the President, to the person claiming to have been appointed to an office; and the proceeding was held to invoke the original jurisdiction of the court, which could not be exercised because the statutory grant of power was not authorized by the Constitution. This view is expressly sanctioned in the Bollman case by Mr. Justice Johnson, who delivered a dissenting opinion, in which, however, he concurred with the Chief Justice on this point. He said:

“ The original jurisdiction of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a State shall be a party. In all other cases within the judicial powers of the Union, it can exercise only an appellate jurisdiction. * * * In the latter, its powers are subjected to the will of the legislature of the Union, and it can exercise appellate jurisdiction *in no case*, unless expressly authorized to do so by the laws of Congress. If I understand the case of *Marbury v. Madison*, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.”²

The obvious corollaries from these decisions are that the constitutional provisions operate merely as authority to the Congress to grant appellate jurisdiction to the court, that a

1. 1 Cranch. 175.

2. 4 Cranch. 103.

legislative grant pursuant to such authority is essential to the judicial exercise of any appellate power, and that any legislative grant of power in excess of such authority is ineffectual and void. The conclusion necessarily follows that it is discretionary with Congress whether it will grant or permit the court to exercise any appellate jurisdiction, and if so, to what extent, within the limitations of the Constitution. The further conclusion is also inevitable, that if the Congress refuses or neglects to enact any legislation on the subject, the court is thereby deprived of all appellate jurisdiction.

The court practically affirmed this view in 1868, in the case of *Ex Parte McArdle*.¹ The action of Congress in that connection was distinctly discourteous to the court. A statute had been passed in 1867 amending the judiciary act as follows:

“That the several courts of the United States and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or of any treaty or law of the United States. From any final decision of any judge, justice or court inferior to the circuit court, an appeal may be taken to the circuit court of the United States for the district in which such case is heard, and from the judgment of said circuit court to the Supreme Court of the United States.”²

McArdle had been arrested for an alleged violation of the reconstruction acts of Congress and was held under military authority for trial by a military commission. He was brought before a circuit court in Mississippi on a writ of *habeas corpus*, and after a hearing, was remanded to military cus-

1. 7 Wallace, 506.

2. 14 Statutes at Large, 385.

tody. He appealed to the Supreme Court. A motion was made to dismiss the appeal on the ground that the court had no jurisdiction of the case. The court, after a hearing and careful examination of the question, unanimously decided that it had jurisdiction under the act of 1867.¹ The case was then argued and submitted to the court on the merits and taken under advisement. The Congress immediately repealed so much of the act of 1867 as authorized an appeal to the Supreme Court; and upon its attention being called to the repealing act, the court held that it had lost jurisdiction of the case, and dismissed the appeal.²

This decision was very unfortunate for the reputation and influence of the court. It had perchance unwittingly exposed itself to this rebuke by upholding its jurisdiction solely under the act of 1867. The court had, however, as heretofore shown, exercised the same jurisdiction in similar emergencies under the old judiciary act in the Hamilton, Burford and Bollman cases,³ and the last two cases are referred to with approval in the opinion of Chief Justice Chase in the McArdle case.⁴ The act of 1867, it is true, was more comprehensive and afforded a more convenient mode of reviewing that class of cases. But it did not repeal or affect in any wise the provisions relating to the writ of habeas corpus in the judiciary act; and this view was maintained in the opinion of the Chief Justice. Indeed the act of 1867 in terms declared that it was enacted to authorize and afford redress "in addition to the authority already conferred by law." If, therefore, the members of the court had been favored with the courage of their convictions, they would not have dismissed the appeal, but issued a writ of *habeas corpus* and retained the record of

1. 6 Wallace, 318.

2. 7 Wallace, 506.

3. 4 Cranch. 100, 101.

4. 6 Wallace, 324.

the case, which had been brought before the court by the appeal and then decided the merits. The only office of a writ of certiorari in such a case is to bring up the record from the court below and the issuance of that writ was unnecessary. This course would have been consistent with the prior decisions of the court, and was indispensable under the circumstances to the vindication of its authority and to the maintenance of its dignity and independence. It is one of the highest duties of the supreme judiciary to assert and sustain the jurisdiction of the court, and thus preserve at all hazards its position as an essential and effective balance of power in our system of government.

The latter view of asserting and exercising the appellate power of the court was exemplified and approved in a later decision of a precisely similar case. Chief Justice Chase, speaking for the whole court, delivered an elaborate opinion, in which he made a critical examination of the prior decisions and a complete survey of the entire field of controversy; and it was then decided that in the exercise of its appellate jurisdiction the court might, by the writ of habeas corpus, aided by the writ of certiorari, review the decision of a circuit court remanding a prisoner to military custody, after causing him to be brought before it and ascertaining upon inquiry into the cause of detention that he was held for trial on a charge for murder by a military commission.¹ The Chief Justice, however, in the course of his discussion, seemed to concede that there was no limitation of the power of Congress to take away "in the exercise of its discretion" the appellate jurisdiction of the court. After referring at length to the constitutional and statutory provisions he remarked

"that we are not aware of anything in any Act of Congress, except the Act of 1868 (repealing the Act of 1867), which indicated any

1. *Ex parte Yerger*, 8 Wallace, 85.

intention to withhold appellate jurisdiction in *habeas corpus* cases from this court or to abridge the jurisdiction derived from the Constitution, that the denial to this court of appellate jurisdiction in this class of cases must greatly weaken the efficacy of the writ, deprive the citizen in many cases of its benefits, and seriously hinder the establishment of that uniformity in deciding upon questions of personal rights which can only be attained through appellate jurisdiction, exercised upon the courts of original jurisdiction. * * * These considerations forbid any construction giving to doubtful words the effect of withholding or abridging this jurisdiction.”¹

Referring again to the act of 1868, as having been passed in 1869, he added :

“ The effect of the act was to oust the court of its jurisdiction of the particular case then before it on appeal, and it is not to be doubted that such was the effect intended. Nor will it be questioned that legislation of this character is unusual and hardly to be justified except upon some imperious public exigency. It was doubtless within the constitutional discretion of Congress to determine whether such an exigency existed ; but it is not to be presumed that an act, passed under such circumstances, was intended to have any further effect than that plainly apparent from its terms.”²

And after quoting the language of the repealing act, he continued :

“ These words are not of doubtful interpretation. * * * They do not purport to touch the appellate jurisdiction conferred by the Constitution, or to except from it any cases not excepted by the Act of 1789. They reach no act except the Act of 1867. * * * We could come to no other conclusion without holding that the whole appellate jurisdiction of this court, in cases of *habeas corpus*, conferred by the Constitution, recognized by law, and exercised from the foundation of the Government hitherto, has been taken

1. 8 Wallace, 102-3.

2. 8 Wallace, 104-5.

away, without the expression of such intent and by mere implication, through the operation of the Acts of 1867 and 1868.”³

The point of the reference in the opinion to “an imperious public exigency” is not entirely clear. If it was intended to refer to the power of Congress to suspend the writ of *habeas corpus* in a case of rebellion or invasion it is immaterial and entitled to no weight, as there was no pretense of such a public exigency in 1868 or 1869, when the act was passed. Nor was the enactment, in fact, made for such a purpose. It merely repealed, as held by the court, so much of the act of 1867 as authorized an appeal in a *habeas corpus* case from a decision of the Circuit Court to the Supreme Court. Moreover a suspension of the writ of *habeas corpus* by an act of Congress would apply to all the courts, and would operate as a prohibition of the court of original as well as of appellate jurisdiction—not merely against a review of the decision of an inferior court by the court of last resort. If on the other hand it was intended to suggest that “the constitutional discretion of Congress” extended to the determination of taking away entirely the appellate jurisdiction of the Supreme Court in *habeas corpus* cases, it is equivalent to complete abnegation of its co-ordinate position in the Government with the executive and Congress, as conferred upon it by the Constitution; and it must hereafter in the exercise of its appellate power meekly submit to the will of the other governmental departments.

Chief Justices Marshall and Chase both maintained that the Constitution conferred upon the court its appellate as well as its original jurisdiction, and both assumed that the power of Congress to make exceptions to the appellate jurisdiction was co-extensive with the terms of the grant in the Constitution, so that the National legislature might in its dis-

3. 8 Wallace, 105-6.

cretion practically deprive the court of its appellate power; and their views met with the apparent approval of the court. Those eminent chief magistrates accordingly construed the old judiciary act concerning the appellate jurisdiction of the court, and other acts of Congress relating to the same subject, as virtually superseding the grant of power to the court contained in the Constitution.

The decisions of the *habeas corpus* cases are apt illustrations of this method of interpreting the laws relating to the appellate power of the court. In these cases the court seems to have regarded the right of the petitioners to the writ as chiefly, if not entirely, involving its jurisdiction to decide the merits of the controversies. But the right to the writ in a given case may be merely a matter of practice, as whether the writ is the only, or the exclusive, or simply a concurrent remedy to obtain the desired relief. The principal reason for resorting to this remedy at common law was to procure the discharge of a person from illegal restraint or imprisonment. Under the Constitution and the judiciary acts the unlawful confinement constitutes the "case" or right of action, and the writ is the process or method of bringing the "case" before the court. The power to hear and decide the "case" may include inquiries as to proper parties and the source of authority for the incarceration, as well as the particular facts and circumstances of the "case," all of which involve the course and conduct, as well as the merits of the proceeding. The method of proceeding to invoke this jurisdiction is, doubtless in the discretion of Congress, matter of statutory regulation; but the right to the remedy in some form is guaranteed by the Constitution, and Congress is expressly prohibited from suspending the writ "unless when in cases of rebellion or invasion the public safety may require it."

The right of every person to his liberty, except upon prosecution in the courts and conviction for the commission of

crime, is preserved and assured by the fundamental law; and any illegal restraint of his freedom of action by virtue of Federal authority is "a case arising under the Constitution and the laws of the United States." In the absence of regulation by Congress, the common law writ of *habeas corpus* is the proper and indeed the only remedy for enforcing this right. At common law, however, this potent remedy was occasionally, through the interposition of the King or of Parliament, suspended or denied; and the constitutional provision was adopted to prevent such interference, or any suspension whatever, except during actual rebellion or invasion. The necessary implication from this interdiction is that this particular remedy, at least in substance if not in name, is distinctly retained as the method of exercising in this class of cases the appellate jurisdiction of the court, and, therefore, cannot under the power to "regulate" be taken away even by an act of Congress. The power of "regulation" must be limited to legislation concerning the details of procedure under the ancient writ and conforming them as far as possible to the more modern methods of practice in other cases.

It follows that in either point of view, whether concerning the merits considered as a "case" of unlawful imprisonment under military authority, or relating to the course of procedure by the writ of *habeas corpus*, the Constitution has recognized and conferred upon the court an appellate power and the method of enforcing it, of which it cannot be deprived by the executive or Congress, or by both acting in concert. The court indeed finally asserted its jurisdiction to decide the merits of these cases and maintained its power to issue the writ of *habeas corpus* to bring them before it, but unfortunately omitted to point to the Constitution as the source of its authority, and derived it from doubtful or indefinite legislation which may at any time in the discretion of Congress be modified or repealed.

The judiciary act of 1789 was superceded in 1891 by another act of Congress which cured many defects and supplied several omissions in the former statute relating to the jurisdiction of the court. The latter act practically restored to all the Federal courts within the boundaries of the States the judicial power as designated and extended in the Constitution, giving the Supreme Court explicit authority to review the decisions of the regular district and circuit courts in all cases, among others, of convictions of a capital crime, or involving the construction or application of the Constitution, or the constitutionality of any law of the United States, or the validity or construction of any treaty, or in which the Constitution or law of any State is claimed to be in contravention of the National Constitution. The new act also created an intermediate appellate court in each of the nine judicial circuits, naming them circuit courts of appeals, and conferred upon them appellate jurisdiction to review all the decisions of the circuit and district courts within the territorial limits of such courts of appeals respectively except such decisions as are required in the act to be reviewed directly by the Supreme Court. And under this act even the cases decided by the intermediate courts of appeals may be required by the Supreme Court in its discretion, upon the application of either party, to be certified to and brought before it for its further and final review and determination.

The act of 1891 did not, however, refer in terms to the power of the court to review any of the decisions in the courts of the District of Columbia or of the Territories except those of Indian Territory;¹ and these omissions resulted in a revival of the old controversy concerning the appellate jurisdiction of the court over any of the cases determined in those courts. Repeated efforts have been made in vain to induce

1. Sec. 13.

the court to hold that the statute was broad enough to authorize a review of such decisions to the same extent as those of the regular district and circuit courts within the several States. The power of the court to review the decisions of the Territorial courts was therefore still confined to special statutes relating to those courts, the more important provisions of which were embraced in acts of Congress passed in 1885¹ and 1889.² Those acts restricted the right of review to cases involving money or property exceeding in value a stated amount, except where the validity of a patent, copy-right, treaty, or statute of or an authority exercised under the United States was drawn in question. And there was a special provision in the Revised Statutes of 1873,³ which may have still been applicable to New Mexico and Arizona, authorizing the court to review decisions of certain Territorial courts in *habeas corpus* cases "involving the question of personal freedom."⁴ But most of the cases covered by these statutes were limited, under the judiciary act of 1891⁵ to a review in the circuit court of appeals, unless special leave was granted to appeal to the Supreme Court. The power of the court to review the decisions of the highest courts in the District of Columbia was also confined as a rule to cases in which the matter in dispute was above a stated amount, subject to the same special exceptions applying to appeals from the Territorial Courts.⁶ But by a more recent statute⁷ the Supreme Court was authorized in its discretion to require any case to be certified from this District Court for its further and final review, as it may do in respect to the circuit courts

1. Ch. 355.

2. Ch. 180.

3. Sec. 1909.

4. *Gonzales v. Cunningham*, 164 U. S. 612, 619-21.

5. Sec. 15.

6. Ch. 74, Act of 1893, sec. 8.

7. Act of 1897, Ch. 390.

of appeals within the States. There was, however, no right of review given to the parties in cases from the District of Columbia, or from the Territorial courts, unless the subject of controversy was susceptible of a pecuniary valuation, which, under the decisions, excluded all criminal and even capital cases, including those involving the crime of treason.¹

In 1911, Congress authorized and enacted still another revision of all the prior statutes relating to the Federal courts and their jurisdiction, with some modifications; but without any material change of the appellate power of the Supreme Court. This revision is entitled and is now known as the Judicial Code. Two new courts were organized under its provisions: the Commerce Court, to which was transferred the jurisdiction of the Circuit Court over the decisions of the Interstate Commerce Commission, and certain cases arising under the Acts of Congress to regulate commerce; and the Court of Customs Appeals, to which was given appellate jurisdiction over the decisions of the Board of General Appraisers concerning the collection of customs revenues, etc. The old Circuit Courts were abolished and their former jurisdiction, except as turned over to the Court of Commerce, was transferred to the District Courts, which became the great Federal court of original jurisdiction in the States, and appeals are now accordingly taken directly from its decisions to the Circuit Court of Appeals, or to the Supreme Court. The recent decisions of the latter court construing these statutes leave the compass and extent of its constitutional jurisdiction as restricted and confined as it was held by the earlier decisions to be under the judiciary acts of 1789 and of 1891 and subsequent amendments, as well as under the special statutes relating to the review of decisions from the Terri-

1. *In re Schneider*, 148 N. Y. 157, 162; *Chapman v. U. S.* 164 U. S. 436; *Brown v. U. S.*, 171 U. S. 631; *Sinclair v. Dist. of Columbia*, 192 U. S. 16, 19; *New v. Oklahoma*, 195 U. S. 252.

torial Courts and those of the District of Columbia.¹ The judicial dogma that the Supreme Court has no appellate power by virtue of the Constitution over any of the Federal or Territorial tribunals, and can only review their decisions pursuant to an authority expressly conferred in an act of Congress, is emphasized and rigidly enforced by the later decisions. The strange legal anomaly therefore remains in force that a citizen as a resident of, or as a mere transient in a Territory from a State, may be charged under the Constitution or a Federal statute, with the crime of treason or murder; and, if convicted in the local courts of the Territory, be precluded from a review of his conviction by the Supreme, or any other intermediate Federal appellate court.²

The same limitation of the appellate power of the court has been applied to cases instituted by writs of habeas corpus, and strictly observed.³ But the right of a citizen to resort to this great remedy to obtain his release from illegal restraint or imprisonment is expressly recognized in the Constitution, so that Congress cannot revoke or annul nor even suspend its issuance and operation "unless when in cases of rebellion or invasion the public safety may require it."⁴ The hearing upon the application for the writ is a civil as distinguished from a criminal proceeding to ascertain and enforce a "civil right" even when the only object to be attained is the release of a person from arrest or detention in a crim-

1. *American Security Co. v. Dist. of Columbia*, 224 U. S. 491.

2. *U. S. v. Rider*, 163 U. S. 132, 135-40; *The Pagnete Habana*, 175 U. S. 677, 686; *Farnsworth v. Montana*, 129 U. S. 104, 109-113; *St. Louis, etc. R. Co. v. Taylor*, 210 U. S. 281, 292; *Albright v. Sandoval*, 200 U. S. 9, 11; *Cross v. U. S.*, 145 U. S. 571, 574; *Chapman v. U. S.* 164 U. S. 436, 448, 451.

3. *Cross v. Burke*, 146 U. S. 82, 84-7; *In re Lemon*, 150 U. S. 393, 397; *Ex parte Parkes*, 93 U. S. 18; *Ex parte Siebold*, 100 U. S. 371.

4. Art. 1, sec. 9, sub. 2.

inal prosecution.¹ It is therefore a "case in law or equity" within the strictest sense of the terms of the constitutional grant of appellate jurisdiction to the court, and it is a logical inference that the court may not ignore the privilege or refuse the remedy when proper cause is shown, except in the emergency of a rebellion or invasion imperilling the public safety.

After the establishment of the Court of Claims despite the statutory grant of the right to appeal in certain cases to the Supreme Court, that court held "that under the Constitution no appellate jurisdiction over the Court of Claims could be exercised" by it, and the court refused to entertain such appeals.² No opinion was rendered at the time; but it transpired later that the decision had been based on an opinion of Chief Justice Taney, then deceased, which had been prepared prior to his death and delivered to the clerk for transmission to the court and considered at the hearing. The opinion was mislaid or lost subsequent to the decision. But after a period of twenty years a copy was obtained, which had been made by the executor of the deceased Chief Justice and preserved among his papers; and after the death of the executor it was furnished by his executor to the reporters, and was then by direction of the court published in the regular series of reports.³ It then appeared that the ground of the decision was that the Court of Claims was not vested under the act of Congress with any part of the judicial power, and that neither the lower nor the appellate court was authorized to render a final judgment conclusive upon the parties to the litigation. It was held that the statute merely conferred the power of giving advisory opinions to the Secretary of the Treasury, which

1. *Ex parte Tom Tong*, 108 U. S. 556, 559-60; *Kurtz v. Moffitt*, 115 U. S. 494; *Farnsworth v. Montana*, 129 U. S. 113; *Cross v. Burke*, 146 U. S. 88; *Fisher v. Baker*, 203 U. S. 181.

2. *Gordon v. U. S.*, 2 Wallace, 561.

3. 117 U. S. 697, 706.

were subject to his approval and to that of Congress, and were therefore tentative and subordinate to the final action of the executive and legislative branches of the government. The opinion of the Chief Justice, adopted by the court, reaffirmed the constitutional doctrine that

“the Supreme Court does not owe its existence, or its *powers*, to the legislative department of the Government. It is created by the Constitution and represents one of the great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the others in performing its appropriate functions. * * * The existence of the court is, therefore, as essential to the organization of the Government established by the Constitution as the election of a President or members of Congress. It is *the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States*. No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or processes of execution. Its jurisdiction and powers and duties being defined in the organic law of the Government, and being all strictly judicial, Congress cannot require or authorize the court to exercise any other jurisdiction or power, or perform any other duty.”¹

The Congress amended the act organizing the Court of Claims, by striking out the objectionable provisions pointed out in the opinion of the Chief Justice in the Gordon case making the decisions of the courts as in other cases final and, subject to appeal, conclusive. And since such amendments were adopted the Supreme Court has, pursuant, however, to the permission granted by Congress, entertained appeals from the final decisions of the court of claims.²

But the argument of the Chief Justice in the case of Gordon, reiterated in the later case cited, is equally pertinent

1. 117 U. S. 699-700; *Muskrat v. U. S.*, 219 U. S. 346-7.

2. *U. S. v. Jones*, 119 U. S. 477-9.

and conclusive against the power of Congress to deprive the court entirely of its appellate jurisdiction in any of the particular classes of cases specified in the Constitution. Congress may make such exceptions to the exercise of the appellate power as do not divest the court of the jurisdiction to determine finally the important legal and constitutional questions of first impression, nor deprive it of the judicial discretion to authorize appeals in particular cases of a novel character embraced within the general description of the judicial power in the organic law. Indeed in any other view Congress would have the power to affix absolute limitations to the appellate jurisdiction disqualifying the court to act efficiently, or at all, in maintaining its own independence or the constitutional equilibrium among the several governmental departments. What, then, is the proper remedy if Congress, under the guise of making exceptions to the appellate power, unduly restricts by legislation the jurisdiction of the court? The answer to this question is embraced in the constitutional provision extending the judicial power "to *all* cases arising under this Constitution and the laws of the United States." As such legislation would be in contravention of the Constitution, the court would be compelled to reconsider and overrule its earlier decisions, as it has frequently done in other cases, and pronounce such legislative restrictions ineffectual and void.

CHAPTER IV.

JURISDICTION CONTINUED.

The constitutional jurisdiction of the Supreme Court extends over all the territory of the United States.

The judicial power, like the executive and legislative powers, must, in the absence of an express limitation, be presumed to be co-extensive with the national domain. The Supreme Court, as the grantee of the judicial power, is a partner or participant with the President and Congress in wielding the National sovereignty. Wherever that sovereignty prevails, the three great powers of the General Government, as its component parts, are earlier or later called into action, and exercise under the Constitution their several shares or allotments of the supreme authority. Doubtless the creation of a formal Territorial government can only be effected by the joint exercise of the legislative and executive powers in an act of Congress, but the judicial power is also *ipso jure* in force in the Territory whether recognized in the act or not. As the jurisdiction of the court is ordained in the Constitution, it need not be authorized or sanctioned and cannot be excluded by one or both of its colleagues from its share in the Government of any territory belonging to the Union of the States.

This theory from the narrowest point of view in relation to the original territory of the Union, is hardly open to discussion. The Constitution took effect in March, 1789; and at that time the territory northwest of the river Ohio, from which the States of Ohio, Indiana, Illinois, Michigan and Wisconsin were afterward organized, had been ceded to the

United States by the several States to which it belonged. The territory south of the Ohio and east of the Mississippi rivers and west of the present boundary lines of the States of Virginia and North Carolina, then belonged to those States respectively. Kentucky never had a Territorial Government. It remained an integral part of Virginia until 1792, when with the consent of Virginia it was admitted into the Union as a State. The territory afterward included in the State of Tennessee was also an integral part of North Carolina at the time the Constitution was adopted, and was ceded to the Union in November, 1789, and organized as a Territory in 1790. The title to the territory south of Tennessee, reaching from about the present western boundary of Georgia to the Mississippi River, excepting a narrow strip along the gulf coast, claimed by Spain as a part of Florida, was the subject of conflicting claims by Georgia as within its original boundaries and by the United States under the British treaty of 1783, and certainly belonged to one or the other, or in part to each, prior to the final settlement of the dispute and its organization in 1800 as the Territory of Mississippi. All of this territory north and south of the Ohio river was therefore within the original limits of the Union, and a considerable part if not the whole of it was also within the borders of existing States, and it cannot be assumed that the Constitution did not, *ipso facto*, attach and become as effective there as anywhere within the new or old boundaries of the original States, which sanctioned its adoption.

The same rule in principle must prevail whenever territory has been acquired by conquest or purchase from another Government. Such territory cannot be subject to any particular State or group of States, and must therefore be under the control and government of the United States. In the absence of legislation by Congress the local laws existing at the time of a new territorial acquisition remain in force as far as

they are consistent with the Constitution. Congress may change these laws, and especially those of a political or governmental character, but such new laws to be valid must also be consistent with the Constitution. While the new acquisition remains in a territorial condition, before or after a Territorial Government has been organized, it is open to the entrance of itinerants and settlers from beyond its borders. A citizen from any State may journey or migrate to any National territory without impairing his constitutional rights; and every person sojourning within the territory is entitled to the protection of the General Government. He is entitled to the same protection afforded by the guaranties of the Constitution to the inhabitants of the States. This protection must in the nature of things be a constitutional protection because the Government is a constitutional Government, and can afford no other protection. The General Government was organized solely by authority of the Constitution with the powers and for the purposes therein declared, and can exist for no other purpose. It is a republican form of government, and as such, represents within its borders the National sovereignty as that sovereignty is limited and defined in the Constitution.

These conclusions should, in the light of legal principles, be regarded as necessary corolaries of our system of government. But they have also received the judicial sanction and approval of the Supreme Court. In the language of Chief Justice Taney, delivering the opinion of the court in the case of *Scott v. Sandford*,¹

“the powers of the Government and the rights and privileges of the citizen are regulated and plainly defined in the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the character

1. 19 Howard, 449-50.

impressed upon it by those who created it. *It enters upon it with its powers over the citizen strictly defined and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a Government and sovereignty.* It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, *put off its character and assume discretionary or despotic powers* which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States, and the duties it owes to them, under the provisions of the Constitution. The territory being a part of the United States, the Government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the Federal Government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved.”¹

This view of the Constitution had previously received the sanction of the court in its unanimous decision of *Cross v. Harrison*.² That case involved the validity of the collection of import duties upon foreign goods at the port of San Francisco, after the close of the war with Mexico, which were levied in conformity with the then existing revenue system of the United States, from the dates of the ratifications of the treaty of peace until the system was formally extended to California by subsequent legislation; a period of more than twenty-one months. The executive department ruled and acted upon the ruling that

“by the conclusion of the treaty of peace, the military government which was established under the laws of war, as recognized by the

1. The further inference sought by the court to be drawn from these principles that slave property could be taken into the National territory and lawfully held there, was clearly a *non sequitur*. Slavery can exist only by virtue of positive law, and there was no provision in the Constitution nor in any act of Congress authorizing or permitting man to hold property in man in any territory of the Union. The thirteenth amendment now expressly prohibits slavery anywhere in the United States.

2. 16 How. 164.

practice of all civilized nations, ceased to derive its authority from this source of power. * * * The termination of the war left an existing Government, a Government *de facto*, in full operation, and this will continue until Congress shall provide a Territorial Government. * * * This Government *de facto* will, of course, exercise no power inconsistent with the Constitution of the United States, which is the supreme law of the land. For this reason no import duties can be levied in California on articles of the growth, produce or manufacture of the United States, as no such duties can be imposed in any other part of our Union on the productions of California. Nor can new duties be charged in California upon such foreign productions as have already paid duties in any of our ports of entry, for the obvious reason that California is within the territory of the United States."

The court sustained this view, holding that upon the ratifications of the treaty "California became a part of the United States, or a ceded conquered territory." The court added that in the absence of any provision in the treaty the action of the executive

"was a correct and rightful recognition (of the existing revenue laws) under all the circumstances, and when we say rightful we mean that it was constitutional, although Congress had not passed an act to extend the collection of tonnage and import duties to the ports of California. * * * The ratifications of the treaty made California a part of the United States, and as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right." ¹

This decision is an express authority for the doctrine that the Constitution and laws of the Union take effect automatically in all new territory the instant it is acquired by conquest or purchase. It follows that a special provision in a

1. 16 How. 184-5, 189-91, 198.

treaty to that effect is merely declaratory of the law of the Constitution; and any provision inconsistent with the Constitution must be utterly void. It is immaterial whether the power of Congress to organize or to legislate for the Territories is derived from the general provisions of the Constitution, or from the special provision contained in sub. 2, section 3, Article IV, of that instrument, declaring that it

“shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

In either view the power is limited and controlled by the Constitutional provisions which circumscribe and restrict the exercise of the legislative as well as the executive power, and vest in the Supreme Court as the grantee of the judicial power the jurisdiction to determine in the last resort

“*all* cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.”¹

Chief Justice Fuller, speaking for himself and three other members of the Court in the recent case of *Downes v. Bidwell*,² reiterating in part the language of Chief Justice Marshall in *Marbury v. Madison*,³ said:

“The Government of the United States is the Government ordained by the Constitution, and possesses the powers conferred by the Constitution. ‘This original and supreme will organizes the Government, and assigns to the different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by these departments. The Government

1. Art. III, sec. 2.

2. 182 U. S. 358.

3. 1 Cranch. 176.

of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained.' ”¹

Again, Chief Justice Fuller said in the same opinion, with the like concurrence:

“The power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests and responsibilities the United States is a separate, independent Nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of National power in this country is the Constitution of the United States; and the Government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit.”²

The principal purpose of the constitutional extension of the judicial power to the inclusion of all legal controversies arising under the Constitution and treaties, as well as the laws of the United States, was the creation of an administrative check upon the National executive and legislature. The incidental and necessary effect of requiring the submission to the judicial sanction and approval of all the official acts of the President and Congress in actions involving their conformity with the Constitution, was to restrict and confine those governmental agencies to the proper and valid exercise of their respective powers within the limitations of the organic law. The history of nations had disclosed a general and unyielding tendency on the part of executives and Parlia-

1. 182 U. S. 358.

2. 182 U. S. 369.

ments under all forms of government to stretch and exceed their legitimate powers, resulting gradually in greatly extended and permanent usurpations of authority, to the detriment of private rights and the prejudice of the public welfare. Many illustrations of such "abuses and usurpations" by the English Government are given in the Declaration of Independence as the cause of our own revolutionary resort to the arbitrament of war. The framers of the Constitution accordingly interposed in this indirect manner the judiciary, acting solely as a court in the decision of judicial controversies, as an effectual barrier against the continuation or extension of similar governmental usurpations. It was of course expected and assumed that the court would not hesitate to assert and maintain its authority in this respect. Unfortunately these just expectations have not been fully realized.

The executive and Congress, in establishing Territorial Governments since 1789, have concurred in nearly every instance in following substantially with varying details the precedent of the old Congress of the Confederation in the organization of the Northwestern Territory, as modified by the new Congress after the adoption of the Constitution. It was necessary in that case to designate and determine in the form of a compact between the Confederation and the new body politic the general plan of Territorial Government, including the particular conditions and limitations of the legislative and judicial powers and the rights and duties of the inhabitants until the Territory assumed the higher rank of statehood. Under the Confederation there was no real executive power and no separate judiciary, and therefore no formal method of administering justice even in the exercise of the limited jurisdiction conferred upon the old Congress, except by a committee of that body. There was no court in existence authorized to review the decisions of the Territorial ju-

diciary. It was accordingly indispensable that special provision should be made in the organic compact concerning the original and appellate jurisdiction of the Territorial tribunals.

The new Congress in following this early precedent failed to recognize the full force and effect of the later constitutional provisions relating to the extension of the judicial power and to the essential limitations of the executive and legislative powers. It apparently ignored the fundamental fact that as a legislative body it was itself merely the creature of the Constitution and subject to the specific terms and limitations of the affirmative special grant of the legislative power.¹ It assumed that in legislating for the Territories or any unorganized territory of the General Government it could recognize or ignore its co-ordinate judicial department, or even the Constitution itself, and exercise absolute and unlimited sovereignty. Upon this singular assumption the new Congress deemed itself competent to extend the jurisdiction of the Supreme Court into any Territory or to exclude it therefrom, in its discretion. In other words Congress adopted the theory, and acted upon it, that the Territories had no lot nor part in our constitutional system of government.

This view is not only unauthorized, but is fallacious and utterly inconsistent with the organic law. When new territory is acquired, Congress may exercise its legislative power and enact laws for its administration and control. It may organize it as a Territory, and make special rules and regulations for its temporary government. This power is conferred by the Constitution and its exercise must therefore be in accordance with the Constitution. The new territory is acquired by and belongs to the United States, and the power of

1. Only the "legislative powers herein granted shall be vested in a Congress of the United States." Art. 1, sec. 1, of the Constitution.

Congress is exercised as the legislative power of the Government. This Government is triune as it includes the legislative, executive and judicial powers, and cannot exist or act otherwise. As these powers are co-ordinate, and are supreme in their respective spheres, within the limitations of the Constitution, neither of them can exclude either of the others from its distinctive share in the General Government. The Government cannot perform its functions independently of its trinal nature, each department acting in its proper sphere. And it follows that the legislative power cannot ignore or exclude the executive power nor the judicial power, from any territory acquired by the Government, nor from any Territory organized under the Constitution. Congress may refuse, however, to admit the new Territory as a State. But as a Territory its inhabitants are entitled to the same protection under the Constitution as citizens in the States.

It is doubtless expedient if not necessary in every act of Congress creating a Territorial Government, to state the general nature and extent of its governmental powers and also any special privileges or obligations of residents and property owners peculiar to the local situation, so far at least as they are not contained in the Constitution or in the Federal statutes. But it is quite unnecessary to repeat constitutional or general statutory provisions in the organic acts in order to make them operative in the Territories. An Act of Congress, unless limited in its terms, is *ipso facto* in force in all the National territory, prior to the organization of a local government; and Congress, by legislative act, can neither extend nor inhibit the dominion of the Constitution in any territory whatever. The Constitution is immanent and supreme everywhere in the States and Territories and, as the fundamental law, has inherent force wherever the Government has sway. Neither the President nor Congress, in their official action, can absolve themselves respectively from

their constitutional allegiance. Any other view will enable these departments to become as omnipotent in all newly acquired territory as the Roman Senate and Imperators ever were in the provinces of the Empire.

The executive and legislative branches of the General Government have, however, assumed and exercised this unlimited power to a greater or less extent, in our National territory. The President, in the absence of legislation, has repeatedly resorted to what has been not inaptly termed the war power, i.e., the plenary power of a Roman Imperator. But there can be no valid exercise of the war power unless there be a state of war at the time; and a valid declaration of war can only be made by an act of Congress. The action of Congress has been equally unjustifiable and arbitrary. In several of the earlier acts of Territorial organization, as in Orleans, special provisions were inserted extending particular clauses of the Constitution and certain general statutes, specifying them, previously enacted. In the later Territorial organic acts, as in those of New Mexico and Arizona, as well as in those affecting as Territories the States of Kansas, Nebraska, North Dakota, South Dakota, Colorado, Nevada, Idaho, Wyoming and Oklahoma, the provisions were general, extending therein in bulk the Constitution and laws of the United States. With reference to Utah, Montana and Washington the unusual course was taken of requiring the people of those Territories to adopt the Constitution in their own behalf as a condition precedent to their admission into the Union as States. But there was no formal extension by Congress of the Constitution to Vermont, Ohio, Indiana, Illinois, Michigan, Tennessee, Mississippi, Alabama, Florida, Missouri, Arkansas, Iowa, Wisconsin, Minnesota, Oregon, Texas or California, as Territories or as States. The laws of the United States, however, were invariably extended formally to all the States, upon their organization as Territories or their admis-

sion into the Union, and frequently on both occasions. In admitting the State of Louisiana there was an extension of the laws, but not of the Constitution; but in that case there had been a prior partial extension of the Constitution, including certain enumerated provisions when it was organized as the Territory of Orleans. The organic acts of Hawaii and Porto Rico were in many respects *sui generis*, owing to the peculiar circumstances of their acquisition and their large foreign populations, as well as the prior political independence of one and the former governmental connection of the other. But there has been no formal extension of the Constitution to either Territory. In the remaining possessions of Alaska and the Philippine Islands and especially in the archipelago, there was no formal recognition of the Constitution or of the laws of the United States, as such, and the President was distinctly given all the power of an absolute and irresponsible ruler. The act of Congress of March 2, 1901, vesting "all military, civil and judicial powers necessary to govern the Philippine Islands" "in such persons to be exercised in such manner as the President of the United States shall direct," and similar acts concerning the Territories of Orleans, Florida and New Mexico, are without a parallel in the history of constitutional government. Even the crown colonies of England were not subject to the absolute dominion of the King but were invariably recognized as entitled to the benefit of the bill of rights and of *magna carta*.

A distinction has been partially recognized by Congress in exercising this arbitrary authority between the original territory of the Nation and that subsequently acquired. Thus, in the compact ordinance of 1787, organizing the "Northwest Territory," the Continental Congress was given power to appoint the governor, judges and general officers, and to disapprove any local laws passed by the Territorial Assembly; and the Territory was to remain subject "to all the acts and

ordinances of the United States in Congress assembled " conformable " to the Articles of Confederation, and to such alterations as should be constitutionally made." But after the adoption of the Constitution, all the power and authority reserved by the ordinance of 1787 was by an act of the new Congress¹ transferred to and bestowed upon the President of the United States. The provisions embodied in the ordinance were, after the admission of Ohio as a State, referred to and retained in the later organic acts of the Territories of Indiana, Illinois and Michigan, as well as in the acts organizing the Territories south of the Ohio and east of the Mississippi rivers, and the President became, with the consent of Congress in exercising such reserved powers, its *alter ego* in all the original territory of the United States, excepting that part finally included in the State of Wisconsin; and as even that State as a Territory, or nearly all of it, was at first embraced within the Territory of Michigan, it was also subject for years to the same domination. However, as these earlier Territories were organized in the manner and with the usual powers then in vogue, and by common consent were regarded as incipient States, there was no inclination to treat them as foreign territory or to rule their inhabitants as aliens beyond the protection of the Constitution.

From this brief analysis of the various organic Territorial Acts and the subsequent acts or joint resolutions of Congress admitting such Territories as States, it is evident that no uniform governmental rule as to the necessity of extending the Constitution beyond the boundaries of the original States to give it proper force and effect in such outlying territory was established. No adequate reason can be assigned for the formal extension of the Constitution into New Mexico and not likewise to Texas and California; nor for extend-

1. August 17, 1789.

ing it to Kansas and Nebraska and not to Iowa or Minnesota; nor for requiring the people of Utah to adopt it before admitting that Territory as a State and not making the same requirement of the people of Idaho; nor for making any distinction in this respect between Washington and Oregon. Doubtless these variable methods of formal dealing with the Constitution in the Territories and in the new States may be attributed partly to the casual selection of prior precedents of similar action followed without serious thought or reflection, and partly to the idiosyncrasies of members of the Congressional Committees or of representatives of the localities having particular measures in charge; and moreover in certain cases to peculiar conditions existing at the time,—as in Kansas on account of the violent agitation of a claim of right under the Constitution to hold slaves in the Territory—and in Utah by reason of the prevalence of the peculiar tenets of the devotees of the Mormon religion concerning the practice of polygamy. While in such exceptional cases it was deemed proper and prudent to formally extend the fundamental as well as the statutory law into new States and Territories, it was also assumed and acted upon accordingly, in quite as many if not more numerous instances, that such an extension was unnecessary; and no formal extension of the Constitution was made in or to at least half of the new States, either as States or as Territories; so that if it should now be held that an extension by law is indispensable to bring new territory within the pale of the Constitution, it must ensue that seventeen States of the Union are at least as bereft as the Philippine Islands of constitutional protection. That the simple admission of a Territory as a State was not regarded as an implied extension of the Constitution is apparent from the fact that in at least a dozen instances it was deemed necessary to accompany such admission with an ex-

press provision extending the Constitution within the borders of the new State.

In view of this diversity of legislation, and to tranquilize disputes concerning the propriety of a formal extension of the Constitution over new territory, and the consequences of omitting it, a general statute was enacted in 1874, as follows:

“The Constitution and all laws of the United States which are not totally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere in the United States.”¹

It will be observed that this statute did not remedy the earlier omissions to extend the Constitution, where the Territory had then been admitted as a State; and this was the fact concerning all the States above mentioned. Nor does the general statute include new territory which had not been organized with the usual and formal Territorial government. Does it include Alaska? This acquisition has never had a Territorial governor or legislature. It has only been organized by Congress as a collection and a judicial district. But the court has nevertheless repeatedly decided that it is a Territory of the United States.²

There is accordingly no definite and settled rule of interpretation established by governmental policies and precedents limiting the supremacy of the Constitution to such new States as may be designated and declared in acts of Congress, even if such precedents were controlling as the highest authority in constitutional interpretation. But a formal extension by legislation of the Constitution is merely declarative of the pre-existing organic law. It may, however, be conceded that

1. Revised Statutes, sec. 1891.

2. *Interstate Commerce Commission v. Humboldt Steamship Co.*, 224 U. S. 474, and cases cited.

such affirmative legislation is expedient at times to tranquilize local agitation and settle political contentions. This course has been frequently resorted to in the State legislatures in the enactment of statutes reaffirming established principles of the common law.

A similar lack of method and uniformity is apparent in the legislation concerning appeals from the decisions of Territorial courts and special district courts of Federal jurisdiction in the States, authorized to exercise the additional powers of circuit courts of the Union. In the earlier acts there was no provision made concerning the right of appeal in such cases to the Supreme Court, except in relation to the Federal district courts of Maine and Kentucky. The only pretense of such a provision or its equivalent in the Orleans Territorial Act was based in the Durosseau case upon a general reference to the jurisdiction of the district court of Kentucky. That court had been organized under a special act of Congress while all the region embraced in the district was a part of the State of Virginia; and the act creating the court was continued in force when, with the consent of the parent State, the entire district was set apart and admitted as a separate State. This, indeed, was the first instance in which, in connection with the Federal district court for Maine, an inferior court of original jurisdiction was vested with the powers of a circuit as well as a district court; and it was therefore deemed expedient to insert a special provision in the judiciary act of 1789,¹ allowing appeals from the circuit decisions of these two courts in such cases as were authorized from other circuit courts in the several States. The Congress in later acts organizing similar district courts for the States of Ohio and Tennessee and for the Territory of Orleans, inserted in each of them the identical provision that the district judge should "in all things have and exercise the same juris-

1. Sec. 10.

diction and powers which are by law given to or may be exercised by the judge of the Kentucky district." It is apparent that this provision does not include or even refer to an appeal to the Supreme Court. It is distinctly limited to the original jurisdiction of the district court. Nor does the Kentucky act, to which alone reference is made in the Orleans Act, provide for such an appeal. The right of appeal in such cases was confined to the decisions of the Maine and Kentucky district courts, as authorized by a special provision of the old judiciary act, and that special provision was never altered or amended while that act remained in force.

But no district court of exclusive Federal jurisdiction endowed with the additional powers of a circuit court, has been organized since the act creating the Territory of Orleans in the original or in newly acquired territory of the Union, except in Alaska. Such special district courts have not been established in other organizations until the Territories have been reorganized and admitted as States. The early precedents set in creating these special courts in the States of Ohio and Tennessee were followed as a rule in the other new States by repeating in each act the same reference in identical language to the Kentucky district court, but usually in conjunction with an express provision allowing appeals from the circuit decisions to the Supreme Court in the same classes of cases as from other Federal circuits. The Congress was apparently unwilling to rely upon the authority of the Durosseau case for such appeals. During their prior Territorial existence, however, the Federal judicial powers were invariably conferred upon the Territorial courts to be exercised in connection with their local jurisdiction of other actions not strictly of Federal cognizance. And in conferring this general jurisdiction it was also the practice to insert in nearly all the organic acts special provisions allowing such appeals in similar cases from the decisions of the highest Territorial

courts. In a word the same course has been pursued in this respect in the supervision and control of nearly all the continental territory acquired during any period in the history of the country. But the general policy of the Government has latterly been changed to meet new conditions arising from the acquisition of external or foreign territory, inhabited by alien races, until the Republic has drifted far away from its constitutional moorings, and has even adopted and upheld the despotic schemes of colonial conquest as well as the autocratic methods of administration in such acquisitions which have distinguished and disgraced European Governments in the domination of their colonial possessions, especially in Asia and Africa. The treatment, however, of our continental Territories during our National existence has, with a single exception, been essentially uniform, whether they were located in the original or in the newly acquired territory of the Union.

A distinction has been made in some of the decisions between territory acquired from other nations by conquest or purchase and original territory obtained by cession directly from the States or from the Indian tribes, or under the treaty with Great Britain acknowledging our independence, as to their constitutional status and their relation to and connection with the General Government. Mr. Justice Johnson, of the Supreme Court, presiding in the Federal Circuit for South Carolina in 1827¹ said :

“ There is a material distinction between the territory now under consideration (Florida) and that which is acquired from the aborigines, whether by purchase or conquest, *within* the acknowledged limits of the United States; as also that which is acquired by the establishment of a disputed line. As to both of these there can be no question that the sovereignty of the State or Territory

1. Amer. Ins. Co. v. Cantor, 1 Peters, 517.

within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two Governments, local and general, unless modified by treaty. The question now to be considered relates to Territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is, that the Government and laws of the United States do not extend to such territory by the mere act of cession."

It may have been upon this theory that the Supreme Court ignored the opportunity of deciding this question so far as it related to its appellate jurisdiction when it was clearly presented in the *Durousseau* case.¹ But in the *Cantor* case the circuit court after holding that "the opinion of our public functionaries is not conclusive," examined and determined the question judicially in its general application to the rights of litigants and reached the same conclusion. The particular aspect of this question involved in the latter case was whether an act of the Territorial legislature conferring jurisdiction in cases of salvage, upon inferior municipal courts, was unauthorized and void; and this involved the further question whether the act of Congress organizing the Territory had not vested this jurisdiction exclusively in the superior courts, thereby precluding its transference to the lower tribunals. The decision of the circuit court turned upon the terms of the clause in the act declaring that the superior courts of the Territory should have and exercise the same jurisdiction "in all cases arising under the laws and Constitution of the United States," previously vested by certain earlier Federal statutes "in the court of the Kentucky district." It was held that the clause above quoted operated as a limitation of the grant of power and did not include all the jurisdiction of the Kentucky district court, nor especially cases like that then in

1. 6 Cranch. 307.

question of service or "salvage arising upon wreck of the sea;" and therefore that the Territorial legislature was not precluded from vesting such jurisdiction in the lower municipal courts.

This decision was affirmed in the Supreme Court. The opinion delivered by Chief Justice Marshall, without approving or criticizing the doctrine of Mr. Justice Johnson, went further and held that the superior courts of Florida were not constitutional courts, as under the organic act of the Territory the judges held their offices for the term of four years, and not during good behavior. The Chief Justice, accepting as decisive without discussion the prior official acts of the executive and legislative departments claiming and occasionally exercising absolute power in such Territories, reached the conclusion that the constitutional provision relating to the official tenure of the judiciary applied only to the Federal courts within the States, and that in legislating for the Territory of Florida, "Congress exercised the combined powers of the General and a State Government." The court accordingly decided that the act in question authorizing the Federal judicial power to be vested in the local courts of general jurisdiction limited to a four years tenure was valid, although such a provision would clearly be void or ineffectual if applied to a similar court in any State. But this question was not involved in the case. The Florida act in this respect was unlike all the prior acts of Territorial organization east of the Mississippi River. In all those acts the judges of the higher courts of general jurisdiction, north as well as south of the Ohio River, were authorized in terms to hold their offices during good behavior. Doubtless it was in the power of Congress to confer Federal jurisdiction upon the Territorial courts, but in that event it could not limit the tenure of the judges to any period of time other than that mentioned in the Constitution. The same result therefore might have been

attained by simply holding the four years tenure clause ineffectual, as contrary to the constitutional provision. Thus interpreted, the Florida act, as well as the Territorial legislation, was clearly valid. The Supreme Court, however, in a later decision,¹ relating to the organic act of the Territory of Washington, granting Federal jurisdiction to the Territorial Courts, reaffirmed the doctrine of Chief Justice Marshall. The same answer is applicable to this decision. The reason is wrong but the conclusion is right. The Constitution confers a tenure during good behavior to all judges of inferior courts created by Congress and vested with Federal judicial power. Moreover the apparent entanglement caused by conferring Federal jurisdiction upon the local courts of a Territory could have been and in the Orleans organic act was avoided and all rights subserved by creating a district court of exclusive Federal jurisdiction, which would have remained unaffected and intact when the Territory became a State. The Orleans act did not prescribe the tenure of the Federal district judge; but that was unnecessary as the constitutional tenure was implied, and is controlling whether reaffirmed or not, or even if disaffirmed in an act of Congress. The question of judicial tenure in merely Territorial courts, however, is now of little practical importance, as whether it is stated to be for years or for good behavior, the offices must cease to exist and the official tenure lapse with the termination of the Territorial government.

The Chief Justice also referred in the Florida case to the rights and immunities of citizens of the Territory, which he derived from the treaty of cession. The treaty provided that the inhabitants should be "admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States;" and this stipulation was cited as "the law of the

1. *The City of Panama*, 101 U. S. 453.

land," and therefore controlling in the determination of their status in the Territory. He also reached the conclusion that the inhabitants, and, therefore, all citizens of the United States sojourning in the Territory, were bereft of the right of appealing to "the judicial power conferred by the Constitution" because the Territorial courts were "incapable of receiving it" as their jurisdiction was "not a part of that judicial power which is defined in the Constitution, but was conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States." This view was emphasized in the further statement that the Territorial courts were created "in virtue of the general right of sovereignty which exists in the Government," implying that the exercise of this "right of sovereignty" was not subject to the limitations of the Constitution. The Chief Justice evidently used the words "general powers" and "general right of sovereignty" in the sense of absolute and unlimited authority, as appears from still another statement in the opinion that the constitutional limitation concerning the exercise of admiralty jurisdiction in the States "does not extend to the Territories."

But these views were *obiter*, as the validity of the four years tenure clause could only arise for adjudication in a suit brought by an appointee at the end of that term to oust the judge acting under the prior appointment. They cannot be harmonized with the opinion of the great Chief Justice in the case of *Loughborough v. Blake*,¹ decided in 1820. The point involved in that case was whether Congress had the power to impose a direct tax upon the District of Columbia. The Constitution declares that "the Congress shall have power to lay and collect taxes, duties, imposts and excises; * * * but all duties, imposts and excises shall be uniform

1. 5 Wheaton, 317.

throughout the United States.”¹ The Chief Justice said:

“This grant is general, without limitation as to place. It consequently extends to all places over which the Government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, ‘but all duties, imposts and excises shall be uniform throughout the United States.’ * * * The power then to lay and collect duties, imposts and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole or any particular portion of the American empire? Certainly the question can admit of but one answer. It is the name of our great republic, which is composed of States and Territories. *The District of Columbia, or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania*; and it is not less necessary, on the principles of our Constitution, that the imposition of imposts, duties and excises should be observed, in the one than in the other. Since then the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States. * * * That the general grant of power to levy and collect taxes is made in terms which comprehend the District and Territories as well as the States is, we think, incontrovertible.”

But the terms of the grant of judicial power in the Constitution are quite as broad and general as those of the grant relating to taxes. “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”² If it be the judicial power of the United States, it must, within the reasoning of the Chief Justice, extend to the District of Columbia and the Territories. In this view the appellate power of the Court, in the absence of legislation, extends to a review of all cases decided in the Terri-

1. Art. 1, sec. 8, sub. 1.

2. Art. 3, sec. 1.

tories arising under the Constitution, laws and treaties of the United States, and any exceptions made by Congress to be valid must not operate as a deprivation of the court of this power. But this question was not involved in the Cantor case as the organic act of the Territory of Florida, expressly authorized appeals to the Supreme Court in the same classes of cases as from the Circuit Courts of the United States, and that case even under the statute was clearly within the appellate jurisdiction of the court.

The general discussion of Chief Justice Marshall in the Cantor case of the power of Congress over the Territories was clearly superfluous. His views were, however, reiterated in more recent cases—in one¹ by Mr. Justice Nelson, and in another² by Chief Justice Chase; but in each case these remarks were also unnecessary to the decision. In the former case an action was brought and decided in the Territorial court of Florida, *after* its admission as a State into the Union, and it was held that the State Constitution and Government

“by constitutional necessity displaced the Territorial Government and abrogated all its powers and jurisdiction. The State authority was destructive of the Territorial; and in connection with the establishment of the Federal jurisdiction (by the creation of a district court of the United States) the organization of the Government, State and Federal, under the Constitution of the Union, became complete throughout her limits. No place was left for the Territorial organization.”³

In the latter case the controlling question was whether the proper mode of obtaining a jury in the Territorial court of Utah was pursuant to the Territorial statutes as authorized

1. Benner v. Porter, 9 How. 235.

2. Clinton v. Englebrecht, 13 Wallace, 434.

3. 9 Howard, 244-5.

by the organic act of Congress, or under the general legislation of Congress then in force; and it was very properly decided that the Territorial law prevailed in that respect. Congress, in the exercise of its discretion, has the undoubted power to enact either general or special and local legislation, and the latter must necessarily have the same exclusive force and effect in reference to the special subject or in the designated locality that general legislation has otherwise and elsewhere.

The Supreme Court has frequently resorted to and approved this distinction in the methods of legislation as the proper explanation of any apparent inconsistency in its decisions on this subject. Referring to the above case of *Clinton v. Englebrecht*, and other cases of like character, Mr. Justice Harlan in delivering the opinion of the court in *Page v. Burnstine*,¹ after holding that a Federal statute creating an exception to a general rule of evidence was in force in the District of Columbia, added:

“These views do not at all conflict with the previous decisions of this court, holding that certain provisions of the general statutes of the United States relating to the practice and proceedings in the ‘courts of the United States’ are locally inapplicable to Territorial courts. Those decisions it will be seen proceeded upon the ground mainly that the legislatures of the Territories referred to, in the exercise of power expressly conferred by Congress, had enacted laws covering the same subjects as those to which the general laws of the United States referred. It was therefore ruled that the Territorial enactments regulating the practice and proceedings of Territorial courts were not displaced or superseded by general statutes upon the same subject passed by Congress in reference to ‘courts of the United States.’”

Moreover it must be remembered that in all the foregoing cases and other similar appeals from the Territorial courts

1. 102 U. S. 664, 668.

in which the constitutional *status* of those tribunals was considered, they were strictly local and temporary courts of the Territory, to which Federal jurisdiction had been granted in addition to and in connection with their ordinary jurisdiction of actions at law and suits in equity, of the same character as those within the exclusive jurisdiction of the State tribunals.¹ They were not Federal or United States courts and therefore not constitutional courts, but were resorted to as temporary expedients and invested improperly with Federal jurisdiction until the Territories were admitted as States, when regular district courts of exclusive Federal jurisdiction were established. But if they were not constitutional courts because the official tenure of the judges was for years, as held in those cases, they should not have been formally invested with a Federal jurisdiction, which is strictly of constitutional origin and cannot be constitutionally exercised by unconstitutional tribunals.

In the more recent case, however, of *McAllister v. U. S.*,² the Supreme Court, three justices dissenting, surpassed all its former decisions on this subject. In that case the new acquisition of Alaska had been organized by an Act of Congress, not formally as a Territory, but merely as a collection district, and subsequently as "a civil and judicial district," with a governor but no legislature. The laws of Oregon were adopted as the laws of Alaska, so far as applicable and not in conflict with the laws of the United States. A local court of the district was created and invested with the powers of a district court of the United States in conjunction with general jurisdiction to enforce in all other cases the laws of Oregon. *McAllister* had been appointed pursuant to an act of Congress by the President and confirmed by the Senate as the

1. As in the *City of Panama*, 101 U. S. 453; *Reynolds v. U. S.*, 98 U. S. 145, 154.

2. 141 U. S. 174.

district judge of Alaska to hold the office for the term of four years. At about the expiration of the first year of his term the official successor of the President making the appointment suspended McAllister from office and designated another person to perform his duties, who in his turn was also suspended a few months later and still another person designated in his place; and finally the last person thus designated was appointed district judge in place of McAllister during the third year of his term for a new term of four years, and this appointment was confirmed by the Senate. There was no suggestion that McAllister was not qualified for any reason to perform his judicial duties, nor that he had been guilty of improper conduct in his office or otherwise, and he was summarily dismissed without preliminary notice or hearing. Upon receiving notice of his suspension McAllister vacated the office and did not thereafter attempt to perform its duties nor institute any proceeding to determine his right or title to the office, except to sue in the Court of Claims for his salary from the time of his suspension to the date that the new appointee qualified as his successor and assumed the duties of the office. This was the case on appeal before the court.

Assuming without conceding that the district judge of Alaska was an ordinary civil officer and not "a judge of a court of the United States," the case might well have been decided on the theory that McAllister had waived his right to compensation by voluntarily vacating his office, and making no effort to continue in it or to perform its duties. His subsequent claim of the salary for a part and not the whole of his term was clearly not a claim of title to the office at any time after he had acquiesced in his removal and abandoned further performance of his judicial duties.¹ But the case was decided on the broad ground that McAllister was

1. *Emboy v. U. S.*, 100 U. S. 680, 685.

an ordinary civil officer and therefore held his judicial position subject to the arbitrary will of the President. This conclusion was reached upon the theory that Territorial courts, of which it was conceded the district court of Alaska was an equivalent, were not constitutional courts of the United States; the court citing in its opinion the decisions above referred to as foreclosing further discussion. But none of those cases involved, directly or indirectly, the right of a Territorial judge, appointed under the Territorial organic act, to continue in office during the whole of his official term, as prescribed either in the act of Congress or in the Constitution. In the leading case of *Cantor*, the nearest in point, the decision turned upon the court's approval of Territorial legislation, enacted under a power expressly granted in the organic act, creating an inferior local tribunal and conferring upon it a special jurisdiction in admiralty. The material issue in that case was the power of the local legislature of the Territory, and not the validity or jurisdiction of the Territorial courts created by Congress, or the tenure of the judges composing those tribunals. In the principal case of *McAllister* the leading point in the argument, as stated in the opinion of the Court, was

“that upon general principles, lying at the foundation of our institutions, the judicial power in the Territories, exercised as it must be for the protection of life, liberty and property, ought to have the guaranties that are provided elsewhere within the political jurisdiction of the nation for the independence and security of judicial tribunals created by Congress under the third article of the Constitution.”

The majority of the judges, however, held that they could not

“ignore the fact that while the Constitution has, in respect to judges of courts in which may be vested the judicial power of the

United States secured their independence by an express provision that they may hold their offices during good behavior and receive at stated times a compensation for their services that cannot be diminished during their continuance in office, no such guaranties are provided by that instrument in respect to judges of courts created by or under the authority of Congress for a Territory of the United States. * * * The whole subject of the organization of Territorial courts, the tenure by which the judges of such courts shall hold their offices, the salary they receive and the manner in which they may be removed or suspended from office was left by the Constitution with Congress under its plenary power over the Territories of the United States.”¹

There is no express provision in the Constitution making or authorizing such a distinction between “the judges of courts in which may be vested the judicial power of the United States” and “the judges of courts created by or under the authority of Congress for a Territory;” the statement to that effect being merely an inference; and there was no other judicial authority for the summary conclusion thus announced in the opinion than the *obiter* observations of the judges in the cases already considered, none of which directly involved the status of a Territorial judge under the Constitution. Moreover the whole subject of the organization of the Supreme Court itself and all the Federal courts was left by the Constitution with Congress to be dealt with under its limited tenure of the legislative power.

There was a strong dissenting opinion in the case, in which three justices concurred, maintaining that “no one under our system of law can be appointed a judge of a court of record having jurisdiction of civil and criminal cases, to hold the office at the pleasure and will of another.” In this view it was immaterial whether the judicial tenure of McAllister was during good behavior or for years, as he could not be sus-

1. 141 U. S. 187-8.

pended or removed during his term, except for cause. But, as shown in this opinion, the tenure of good behavior in the office of judges of all courts of record had become the fundamental law of England and its dependencies long before our revolution, and

“ then constituted a part of the public or common law of this country. Whoever is clothed with a judicial office which empowers him to judge in any case affecting the life, liberty or property of the citizen, cannot be restrained from the fearless exercise of its duties by any apprehension of removal or suspension in case he should come athwart the will or pleasure of the appointing power. Under our Constitution and system of government no judicial officer invested with these great responsibilities can hold his office subject to such arbitrary conditions.”¹

The dissenting judges contended that McAllister was not an ordinary civil officer but “ a judge of a court of the United States,” and therefore was not included in the power conferred upon the President to suspend or remove civil officers at his pleasure. The court had previously decided that a Territorial court “ was a court of the United States.”² It is a singular fact that the court had also decided that the constitutional guaranty of trial by jury applied as well to the Territorial courts as to the Federal tribunals in the States.³ And this decision has since been repeatedly approved and confirmed.⁴ This rule has also been applied to the District of Columbia, the court declining to hold that “ the people of this District have in that regard less rights than those accorded to the people of the Territories.”⁵ In the case above cited of

1. 141 U. S. 193-5.

2. *Hunt v. Palis*, 4 How. 589, 590.

3. *Webster v. Reid*. 11 How. 437.

4. *Springville v. Thomas*, 166 U. S. 707; *Rassmussen v. U. S.*, 197 U. S. 516.

5. *Callan v. Wilson*, 127 U. S. 540, 550.

Rasmussen it was held that the constitutional provision concerning a common law jury was also in force in Alaska. And the singularity of that decision is enhanced by the circumstance that the author of the opinion of the court in the case of McAllister not only concurred in the decision of the Rasmussen case but delivered a concurring opinion giving his reasons as follows:

“Immediately upon the ratification in 1867 of the treaty by which Alaska was acquired from Russia, that Territory came under the complete sovereign jurisdiction and authority of the United States, and, without any formal action on the part of Congress in recognition or enforcement of the treaty, and whether Congress wished such result or not, the inhabitants of that Territory became at once entitled to the benefit of all the guaranties found in the Constitution of the United States for the protection of life, liberty and property. * * * The constitutional requirement that the ‘trial of all crimes, except in cases of impeachment, shall be by jury,’ means, as this court has adjudged, a trial by the historical common law jury of twelve persons, and applies to all crimes against the United States committed in any territory, however acquired, over which, for purposes of government, the United States has sovereign dominion. No tribunal or person can exercise authority involving life or liberty in any territory of the United States, organized or unorganized, except in harmony with the Constitution. Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or by mere non-action, can Congress prevent the Constitution from being the supreme law of any peoples subject to the jurisdiction of the United States. The power conferred upon Congress to make needful rules and regulations respecting the Territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument. The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances or for any period of time, long or short, be governed as Congress pleases to ordain, without regard to the Con-

stitution, is inconsistent with the whole theory of our institutions. If the Constitution does not become the supreme law in a Territory acquired by treaty, and whose inhabitants are under the dominion of the United States, until Congress, in some distinct form, shall have expressed its will to that effect, it would necessarily follow that, by positive enactment, or simply by non-action, Congress, under the theory of incorporation, and although a mere creature of the Constitution, could forever withhold from the inhabitants of such Territory the benefit of the guaranties of life, liberty and property as set forth in the Constitution.”¹

This opinion is worthy of the highest encomium. It is a clear, correct, concise and comprehensive outline of the real relationship under the Constitution of the Territories to the Union of the States. Fourteen years had elapsed since the decision of the *McAlister* case when this opinion was written. In the meantime the Territorial question in many aspects had been before the court, and been elaborately argued and carefully considered. It is fair to presume that the views of the surviving members of the court who concurred in the former decision had undergone more or less change in the interval, or they could not have concurred in both decisions. Indeed it is obvious from a comparison of this opinion with the opinion of the court in the former case that their author had during the interval imbibed entirely new conceptions of the legal relation of the Territories to the Constitution. In the earlier opinion he attributed the authority of Congress in the Territories exclusively to its “plenary power” under the special provision in the Constitution enabling it “to make all needful rules and regulations respecting the territory and other property belonging to the United States.” He then said “that it must be regarded as settled that courts in the Territories created under the plenary municipal authority that Congress possesses over the Territories of the United States are not

courts of the United States under the authority conferred by the third article of the Constitution." "Neither were they organized by Congress under the Constitution as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State."¹ But in the latter opinion this learned judge was assured that

"Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor by any affirmative enactment or by mere non-action, can Congress prevent the Constitution from being the supreme law for any peoples subject to the jurisdiction of the United States. The proposition that a people subject to the full authority of the United States for purposes of government, may, under any circumstances or for any period of time, long or short, be governed as Congress pleases to ordain, without regard to the Constitution, is, in my judgment, inconsistent with the whole theory of our institutions."² The power conferred upon Congress to make needful rules and regulations respecting the Territories of the United States does not authorize Congress to make any rule or regulation inconsistent with the Constitution or violative of any right secured by that instrument."

While the majority of the judges did not commit themselves to this opinion, they all concurred in the decision, holding in effect that the Constitution was in force in Alaska, and guaranteed to every citizen of the District or Territory charged with the commission of crime the absolute right of being tried by a common law jury. Congress, in legislating for Alaska, had provided that in certain criminal trials "six persons shall constitute a legal jury;" and this provision was held unconstitutional and void. But if the constitutional provision re-

1. 141 U. S. 182, 184.

2. 197 U. S. 530.

quiring the accused in criminal prosecutions to be tried by "an impartial jury" is in force in Alaska, and the only correct interpretation of this provision is a common law jury of twelve men, why is not the other constitutional provision enabling the judges of the Supreme and inferior courts authorized to be established by Congress to hold their offices during good behavior, which in terms describes the tenure of a common law judge, equally in force in that District or Territory? Why is not the suitor in an Alaskan court entitled to the protection of a trial before a judge acting under the aegis of the Constitution, as well as by a common law jury? If under the Constitution a common law jury is requisite to the proper administration of justice in Alaska, why is not a common law judge, with a tenure of good behavior securing his independence and freedom from governmental coercion or restraint, also indispensable to that end?

The foregoing and cognate constitutional problems respecting the government of the Territories have in recent years been frequently before the Supreme Court for adjudication. But it is difficult even if possible to extract any satisfactory or consistent conclusions from the decisions. The two leading cases growing out of the war with Spain for the liberation of Cuba, resulting in the acquisition of Porto Rico and the Philippines, were *DeLima v. Bidwell*¹ and *Downes v. Bidwell*.² These cases were argued together, and involved the power of Congress to impose duties upon importations from Porto Rico to the Port of New York, after the exchange of ratifications of the treaty of peace. The army of the United States invaded Porto Rico in July, and the Spanish forces evacuated the island in October, 1898. The treaty of peace was ratified and took effect April 11, 1899. The *DeLima* case was brought to recover back duties claimed to have been il-

1. 182 U. S. 1.

2. 182 U. S. 244.

legally exacted by the collector of the Port of New York under the Dingley tariff act, upon importations of sugar from Porto Rico during the autumn of 1899. Spain therefore at the time the duties were collected had ceded the island to the United States and delivered possession under the treaty. The statute known as the Foraker Act to provide revenues and a civil government for Porto Rico, took effect May 1, 1900. This act imposed special duties, at different rates than those of the Dingley act, upon the products of the island imported to other parts of the United States; and in this respect this newly acquired territory was still regarded and treated as a foreign country. The Downes case was prosecuted to recover back duties claimed to have been illegally exacted by the same collector under the Dingley act upon a consignment of oranges from Porto Rico to New York in the month of November, 1900.

The only question presented in the DeLima case was whether Porto Rico, while in the possession of the United States in the autumn of 1899 under the treaty, remained a "foreign country" within the meaning of the tariff laws, and so continued until Congress by special legislation subjected it to the revenue system of the Union. The opinion of the court adopted the definition of a foreign country given by Chief Justice Marshall and Mr. Justice Story in prior decisions at their Federal circuits respectively, as a country "exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States."¹ And the court reasoned as follows:²

"No distinction is made as to the question of supremacy between laws and treaties, except that both are controlled by the Constitution. A law requires the assent of both houses of Congress,

1. 182 U. S. 180.

2. 182 U. S. 195-200.

and, except in certain specified cases, the signature of the President. A treaty is negotiated and made by the President, with the concurrence of two-thirds of the Senators present, but each of them is the supreme law of the land." The territory obtained by treaty "is acquired as absolutely as if the annexation were made, as in the case of Texas and Hawaii, by an act of Congress. It follows from this, that by the ratification of the treaty of Paris the island became territory of the United States — although not an organized territory in the technical sense of the word." "In short, when once acquired by treaty it (such territory) belongs to the United States and is subject to the disposition of Congress." "While a statute is presumed to speak from the time of its enactment, it embraces all such persons or things as subsequently fall within its scope, and ceases to apply to such as thereafter fall without its scope." "So, when the Constitution of the United States declares in Art. I, sec. 10 that the States shall do certain things, this declaration operates not only upon the thirteen original States, but upon all who subsequently become such; and when Congress places certain restrictions upon the powers of a Territorial legislature, such restrictions cease to operate the moment such Territory is admitted as a State. By parity of reasoning a country ceases to be foreign the instant it becomes domestic." "If an act of Congress be necessary to convert a foreign country into domestic territory, the question at once suggests itself, what is the character of the legislation demanded for this purpose? Will an act appropriating money for its purchase be sufficient? Apparently not. Will an act appropriating the duties collected upon imports to and from such country for the benefit of its government be sufficient? Apparently not. Will acts making appropriations for its postal service, for the establishment of light-houses, for the maintenance of quarantine stations, for erecting public buildings, have that effect? Will an act establishing a complete local government, but with the reservation of a right to collect duties upon commerce, be adequate for that purpose? None of these, nor all together, will be sufficient, if the contention of the Government be sound, since acts embracing all these provisions have been passed in connection with Porto Rico, and it is insisted that it is still a foreign country within the meaning of the tariff laws. We are unable to acquiesce in this assumption that a territory may be at the same time both foreign and domestic." "We

are therefore of opinion that at the time these duties were levied Porto Rico was not a foreign country within the meaning of the tariff laws, but a territory of the United States, that the duties were illegally exacted and that the plaintiffs are entitled to recover them back."

Four members of the court dissented from this decision, three of them in a long and labored opinion; and strange as it may seem this dissenting opinion became practically a concurring opinion in the decision of the Downes case, which was made at the same time. The judge who delivered the opinion of the court in the DeLima case also announced the conclusion and judgment of the court in the Downes case; and he wrote the opinion which is published as that of the court, although no other judge concurred in the reasoning of that opinion. The conclusion reached in it, however, was adopted by the majority of the court, and was concurred in by the same justices who dissented in the DeLima case, in a separate and very elaborate opinion; and the four justices including the Chief Justice, who concurred in the opinion of the court in the DeLima case dissented in the Downes case.

The course of reasoning in the opinion of Mr. Justice Brown announcing the conclusion thus adopted by the court in the latter case was as follows: While Porto Rico ceased to be a foreign country upon the ratification of the treaty of Paris and the complete evacuation of the island by the Spanish forces, still it did not become an actual part of the United States or subject to the constitutional provision declaring that "all duties, imposts and excises shall be uniform throughout the United States," as the revenue clauses of the Constitution did not extend of their own inherent force to this newly acquired territory. Congress, therefore, notwithstanding the decision of the DeLima case, was not restrained from treating Porto Rico as a foreign country to the extent

of imposing customs duties upon all importations of its products to the continental ports of the United States. This result was reached by the affirmative recognition of the doctrine that no newly acquired territory of the Union, by the mere fact of its acquisition, comes within the grasp or protection of the Constitution; so that until Congress in the exercise of its free and independent discretion, shall formally extend the authority of that instrument over the new territory, it necessarily remains under the absolute dominion of Congress itself—a body which derives its own existence and all its legitimate powers from the same governmental charter. In this view all the limitations of the legislative power in the Constitution are exhausted within the States, and Congress, the creature, becomes, in the acquisition of new territory, superior to its creator, and in that respect is totally absolved from further obedience to “the supreme law of the land.”

The author of this opinion, evidently fearing the possible consequences of investing Congress with this unlimited authority in the Territories, intimated that there were “certain principles of natural justice inherent in the Anglo Saxon character which need no expression in constitutions or statutes to give them effect, or to secure dependencies against legislation, manifestly hostile to their real interests;” but declined “to anticipate the difficulties which would naturally arise in this connection.” And yet he “disclaimed any intention to hold that inhabitants of the territories are subject to an unrestrained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect.”¹ These amiable reflections would doubtless have been endorsed by the most austere administrations of Roman and Russian imperialism.

Despite the doubts originally entertained by President

1. 182 U. S. 280-83.

Jefferson, which he afterward abandoned, it has become the established doctrine, announced in numerous decisions of the Supreme Court, that the Constitution has conferred upon the General Government full power to acquire new territory by conquest or by purchase or otherwise. This authority is found in the grants of power to declare war and to make treaties, and possibly to regulate commerce with foreign nations. The history of nations discloses from the earliest ages that under these powers territory has usually been lost and won, not only as an incident of the war power by conquest and subsequent cession in the treaty of peace, but as an incident of the treaty making power and of commercial negotiation and purchase. It is therefore solely by virtue of the Constitution that new territory has ever been acquired by the United States. How, then, does Congress, as one of the branches of the General Government, escape from the restraints imposed upon it by the law of its being, and become the absolute ruler of the new territory? By what process of constitutional interpretation does this great fundamental charter, which is supreme within all legitimate Federal jurisdiction, fail to come in contact with and assume control over the new territory, acquired solely by its authority? What is the method of rationation by which Congress as the creature becomes superior to its creator, and is able to relieve itself in the new territory from the limitations of the Constitution? In the view of this opinion it cannot be urged that the territorial clause granting to Congress "power to dispose of and make all needful rules and regulations respecting the territories or other property of the United States," authorizes this abnegation of constitutional dominion in newly acquired territory, as no such claim is made or discussed or even referred to therein, except to disavow it in the pertinent observation that this clause is "apparently applicable only to the territories then existing,"¹ and belonging to the Union.

1. 182 U. S. 285.

There was another opinion in the *Downes* case by Mr. Justice White concurring in the same conclusion, which received the approval of three other associate justices, and was agreed to in substance by a fourth associate justice, but the result was reached by a different and in most respects an incongruous process of reasoning. According to this opinion, the true answer to the question whether the tax was levied in such form as to cause it to be repugnant to the Constitution, was, "Had Porto Rico been incorporated into and become an integral part of the United States?"¹

Speaking generally it was stated in this opinion in some preliminary observations that there were two kinds of provisions in the Constitution, those concerning the granting of powers to Congress, and those prohibiting it from the exercise of any authority. As to the prohibitions it was taken for granted that "in the nature of things limitations of this character cannot be under any circumstances transcended because of complete absence of power."² But why is not an absolute restriction in the Constitution as inapplicable to the Territories as an affirmative but limited grant of power, either before or after their incorporation into the Union? If the negative provisions of that instrument are applicable and therefore in force, why are not the affirmative provisions also in force in the Territories? As to the powers granted it was maintained that "in the case of the Territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is, not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable."³ Ordinarily, in deciding a case arising within a State involving a Federal question

1. 182 U. S. 299.

2. 182 U. S. 294-5.

3. *Id.* 292.

under a provision of the Constitution, the preliminary point to be considered is whether the particular provision is applicable to the case—in other words, whether it is pertinent to the issue raised concerning the constitutionality of the act or thing that is the subject of examination. But if the same question were involved in a case arising in a Territory, the preliminary point, according to this opinion, would be, not whether the Constitutional provision appealed to for protection was applicable to the case, but whether it was applicable to or in force in the Territory; and if found to be inapplicable to the Territory the other question would not be considered. In this view the preliminary question should turn upon the fact whether the territory had been formally incorporated into the United States. But even after such an incorporation it would seem that the question remains whether the particular provision of the Constitution relied on is applicable to the Territory. In the language of the opinion,

“the determination of what particular provision of the Constitution is applicable, generally speaking in all cases, involves an inquiry into the situation of the territory and its relations to the United States. This is well illustrated by some of the decisions of this court. Some of these decisions hold on the one hand that, growing out of the presumably ephemeral nature of a Territorial Government, the provisions of the Constitution relating to the life tenure of judges are inapplicable to courts created by Congress, even in Territories which are incorporated into the United States; and some on the other hand decide that the provisions as to common law juries found in the Constitution are applicable under like conditions; that is to say, although the judge presiding over a jury need not have the constitutional tenure, yet the jury must be organized in accordance with the Constitution.”¹

This illustration is equally apposite to prove how inade-

1. 182 U. S. 293.

quate as well as inconsistent and even absurd, the proposed test is in determining the constitutionality of an act or transaction taking place in or relating to, or involved in a case arising in a Territory. The question will still remain open as a subject of judicial inquiry, whether the particular constitutional provision to be considered is applicable to or in force in the Territories.

The principal reason urged in support of the leading provision, discussed in this opinion, for the exclusion beyond the boundaries of the States of all the affirmative limitations of the Constitution upon the executive and legislative powers in governmental affairs, as inapplicable to the Territories until they have at least been formally incorporated by acts of Congress into the Union, is itself a plain repudiation of allegiance by the General Government to the organic law. It is indeed indubitable that under the law of nations when new territory is acquired by conquest or otherwise, "the relation of the territory to the new government is to be determined by the acquiring power, in the absence of stipulations upon the subject."¹ But it does not follow as assumed in the opinion that the United States may adopt and pursue the same policy as other nations in the management and control of such Territory. The citation, therefore, in the opinion, of numerous authorities on international law is of no importance, that when

"the conquered are a fierce, savage and restless people the conquerer may, according to the degree of their indocility, govern them with a tighter rein, so as to curb their impetuosity and keep them under subjection. Moreover, the rights of conquest may, in certain cases, justify him in imposing a tribute or other burden, either as a compensation for the expenses of the war or as a punishment for the injustice he has suffered from them."²

1. 182 U. S. 300.

2. 182 U. S. 302.

The citation also of the remarks of Chief Justice Marshall in the *Cantor* case is unimportant, that "ceded territory becomes a part of the Nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose."¹ These citations are ineffectual for any purpose unless they are made to justify the inference that the United States may exercise all the powers of any other nation, royal or imperial, as well as republican, over the inhabitants of conquered territory; so that the President and Congress, like absolute rulers in other countries, may in the exertion of unlimited authority govern such territory in the same unrestricted manner as some European monarchies, and may accordingly in its discretion govern the Philippine Islands as the three allied powers governed in the past their respective subdivisions or shares in the partition of Poland, or as Russia now proposes to govern Finland. Doubtless, in international affairs the United States has the same powers, and is subject to the same rules as other nations, but when the title to new territory has passed to the conqueror, it is no longer subservient to the international law and becomes subject to "such terms as its new master may impose." The new master, however, with us is limited in the imposition of terms by the provisions of our organic law, which must be observed. It is not, then, a question of international but of National or local law, and in the case of the United States of constitutional law; and the General Government in dealing with new territory or any territory must, as in the administration of all other internal affairs, be subject to the limitations of the Constitution.

The further consideration is pressed in this opinion of Mr. Justice White that if the United States cannot occupy, hold or acquire new territory without conferring upon its inhabitants all the rights and privileges of American citizens, it

¹ 1. 182 U. S. 302.

will render this country comparatively helpless in the family of nations, as in that view it cannot avail itself of the international right to obtain redress for losses in war or retain conquered territory as security or indemnity for such losses.¹ There is some confusion of ideas in this argumentation. To occupy or hold territory temporarily or indefinitely merely as security for the payment of an indemnity or as a punishment of an enemy in war is not to acquire the title or to recognize it as a part of the United States; and doubtless it is a proper exercise of the war power under the Constitution. It is obviously a matter within the discretion of the General Government whether it will resort to this mode of redress or will claim and hold a cession of the absolute title to territory as a National possession. The time to determine this question is while negotiating the treaty of peace, or in the event of complete subjugation, at the end of the war. If the territory is for any reason an undesirable acquisition, the title should not be taken or received under any circumstances. The formation of the Republic was a new venture in the family of nations, but the venture in the first century of its existence had proven to be a marvellous success. There was no occasion for embarking in another venture; and it was an unpardonable act to engage in aping and rivalling the monarchical nations of Europe in acquiring territory by ruthless conquest, or of indulging in their despotic methods of government of the weak and defenceless peoples they have taken under their protection.

The further suggestion is made in the same connection that unless the government can acquire the title to new territory and control it absolutely, it will be prevented from holding any part of it as property for National use or convenience or for any beneficial purpose. As above stated, it is discretionary with the Government whether conquered territory shall

1. 182 U. S. 306-9.

be taken and held temporarily as security for the performance of an undertaking to make compensation for losses sustained in the war, or the absolute title be required and received in satisfaction of such injuries. And if the title is acquired the Congress is given exclusive authority over all places required for public use within the Territory; and this is also the case, even in a State, with property purchased by the consent of the State legislature in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;¹ and it has been repeatedly held by the court that the power to purchase property inheres by virtue of the Constitution in the General Government for public use. If for any reason the State or a private owner refuses to sell such property, it may be taken adversely by the right of eminent domain.² Before the Territory becomes a State it is subject to the legislation of Congress, which may require any portion of it to be set apart for National purposes and may reserve the same permanently when the Territory is received as a State into the Union. A fundamental error of this opinion is the assumption thrown out at first with apparent hesitancy and in doubtful or obscure intimations, but finally maintained with boldness and energy,

“that the treaty making power cannot incorporate territory into the United States without the express or implied assent of Congress; that it *may* insert in a treaty the conditions *against* immediate incorporation; and that on the other hand when it has *expressed* in the treaty conditions *favorable* to incorporation, they

1. Constitution, Art. II, sub. 17.

2. Kohl v. U. S., 91 U. S. 367; Boom Co. v. Patterson, 98 U. S. 406; U. S. v. Jones, 109 U. S. 513; U. S. v. Great Falls Mfg. Co., 112 U. S. 645-656; Fort Leavenworth R. Co. v. Lowe, 114 U. S. 531-2; VanBrocklin v. Tennessee, 117 U. S. 154-5; Cherokee Nation v. Kansas R. Co., 135 U. S. 641, 656; Ryan v. U. S., 136 U. S. 68, 81; Chappell v. U. S., 160 U. S. 499, 509-10; U. S. v. Gettysburgh El. R. Co., 160 U. S. 668-679; U. S. v. Lynch, 188 U. S. 445-6.

will, if the treaty be not repudiated by Congress, *have the force of the law of the land*, and therefore by the *fulfillment* of such conditions *cause* incorporation to *result*. It must follow that where a treaty contains *no conditions* for incorporation, and above all, where it not only has no such conditions but *expressly provides to the contrary*, incorporation does *not* arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family.”¹

The following propositions are involved in this dictum:

1. A foreign power ceding territory to the United States *may*, with the assent of the President and Senate, impose a condition “*against* its immediate incorporation into the Union.”
2. The foreign and domestic treaty powers may, with the *assent of Congress*, require its immediate incorporation into the Union; or, if there be *no dissent* of Congress, such a condition in the treaty will “*have the force of the law of the land*.”
3. If the treaty “contains no condition for incorporation” or “*expressly provides to the contrary*,” there can be no incorporation of the territory, and it does not become a part of the United States until Congress shall legislate to that effect.

If this be sound doctrine, the President and Senate, exercising the treaty power, may, with the aid of a foreign nation and the subsequent approval of Congress, ignore or renounce the Constitution and prevent its provisions from taking effect in newly acquired territory. In this view Congress, or rather the Senate, and not the court, is the final arbiter of the validity of the treaty. But the President and Senate are as clearly bound in the negotiation of a treaty, as in legislation, by the limitations of the Constitution, and there is no other law by which the treaty can be tested. A treaty, like an act of Congress, if it contain provisions inconsistent with or in violation of the organic law, is to that extent ineffectual

1. 182 U. S. 339.

and void. Doubtless a treaty containing a cession of territory from a foreign power may stipulate for reasonable treatment of its inhabitants and the protection of their property, and even for a temporary qualification or change of existing statutes concerning the collection of revenue in the new territory, but it cannot impose any condition requiring the United States to govern the territory in any manner inconsistent with the provisions of the Constitution.

A treaty cannot furnish the basis for legislation by Congress, or for an adjudication by the court, as stated in this opinion, to the effect "that whilst in an international sense Porto Rico was *not* a foreign country, since it was subject to the sovereignty of and was owned by the United States, it *was foreign* to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."¹ The treaty with Spain contained the following provision: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."² But the nature and extent of the civil rights and political status of these native inhabitants were constitutional propositions and could only be ultimately determined by the Supreme Court. The Constitution is the sole standard and affords the only test by which to determine when it takes effect in newly acquired territory and also as to the actual civil rights and political *status* of its inhabitants; and this fundamental law cannot be shuffled in or shuffled out of any region of country acquired by a government deriving from this organic act its own existence and all the powers by which the territorial acquisition was secured. It is not only an elementary but too plain a proposi-

1. 182 U. S. 341-2.

2. 182 U. S. 340.

tion for extended discussion, that a foreign nation cannot confer upon Congress a final jurisdiction in the Territories or over their inhabitants which the Constitution has given exclusively to the Supreme Court.

The fourth justice dissenting in the DeLima case and concurring in the Downes case, Mr. Justice Gray, delivered in each case an additional opinion containing his special reasons for his conclusions, in which he referred to the case of *Fleming v. Page*¹ as a decisive authority against the decision in the former case and in favor of the decision in the latter case. He said in the first opinion that he was compelled to dissent from the judgment in *DeLima v. Bidwell* because it appeared to him "irreconcilable with the unanimous opinion of the court in *Fleming v. Page*, and with the opinion of the majority of the justices"² in *Downes v. Bidwell*. He referred again to *Fleming v. Page* in the second opinion as upholding the doctrine that "so long as Congress has not incorporated the territory into the United States, neither military occupation nor cession by treaty makes the conquered territory domestic territory in the sense of the revenue laws."³ The other three dissenting judges in the DeLima case also cited in their opinion *Fleming v. Page* as a direct authority to the effect that Porto Rico was a foreign country within the meaning of our revenue laws.⁴

These repeated references to the decision in *Fleming v. Page* as conclusive in favor of the contention that Porto Rico remained a foreign country after the treaty of Paris and the evacuation of the island by Spain, render it necessary to examine that decision with some care. *Fleming* brought the action against the collector of the port of Philadelphia to

1. 9 How. 603.

2. 182 U. S. 220.

3. *Id.* 346.

4. *Id.* 202-5.

recover back certain duties, paid under protest, upon goods imported from Tampico, Mexico, while that place was in the military occupation of the army of the United States, during the Mexican war. In the subsequent treaty of peace Tampico was restored to Mexico, and evacuated by the American forces. It was therefore properly held that Tampico remained a foreign port during the war, and that the duties in question were legally levied and collected. The material distinction between that case and the DeLima case is that in Fleming v. Page the war was still in progress and the military occupation was temporary as a war measure; and, as stated by Chief Justice Taney in the opinion of the court, it

“ was held in possession in order to distress and harass the enemy. While it was occupied by our troops they were in an enemy’s country, and not in their own; the inhabitants were still foreigners and enemies and owed to the United States nothing more than the submission and obedience sometimes called temporary allegiance, which is due from a conquered enemy, when he surrenders to a force which he is unable to resist. But the boundaries of the United States as they existed when war was declared against Mexico were not extended by the conquest; nor could they be regulated by the varying incidents of war, and be enlarged or diminished as the armies on either side advanced or retreated. They remained unchanged.”¹

But in the DeLima case the war was closed and peace proclaimed; and Porto Rico had been ceded and full possession delivered under the treaty to the United States. And in the Downes case the further fact appeared that the act of Congress organizing a new government of the island, had become a law of the land. Having thus disposed of the controversy, the Chief Justice in Fleming v. Page indulged in the *obiter* discussion of another question claimed as bearing on the

1. 9 How. 615-16.

Porto Rican cases, originating in a misapprehension on his part of the course pursued by the executive department in such cases. He said :

“ The department in no instance that we are aware of, since the establishment of the government, has ever recognized a place in a newly acquired country as a domestic port, from which the coasting trade might be carried on, unless it had been previously made so by an act of Congress.”

If this were true, it was not binding on the court, acting judicially; but it was not well founded in fact. The only instances cited were Louisiana and Florida. A critical examination, however, of governmental records discloses the fact that only in the single instance of Louisiana was such a course pursued or deemed proper. In the case of Florida there was no delivery under the treaty until after Congress had extended the revenue laws over the Territory. But in the case of California, acquired in the Mexican War by conquest, and confirmed by the treaty of peace, the executive department, as shown by the documentary evidence of the action taken by the Secretaries of State, of War and of the Treasury, determined that during the intermission of nearly two years between the ratification of the treaty and the Act of Congress, relating to the revenue in that territory,

“ all articles of the growth, produce or manufacture of California * * * were entitled to admission free of duty into all the ports of the United States; and all articles of the growth, produce or manufacture of the United States were entitled to admission free of duty into California, as were also all foreign goods which were exempt from duty by the laws of Congress.”¹

These documents were dated in October, 1848, and the de-

cision in *Fleming v. Page* was made in 1850. It is a fair inference that none of these documents was brought to the attention of the court in that case; but they were referred to, and should have been known to all the justices in the Porto Rican cases. And this was the view taken of *Fleming v. Page* by the majority of the judges in the *DeLima* case as appears in the opinion of the court.¹

The case of *Dooley v. U. S.*² was argued and decided at the same time and in connection with those of *DeLima* and *Downes*. The action was brought to recover back duties exacted, and paid under protest, at the Port of San Juan, Porto Rico, upon goods consigned to that place from New York, between July, 1898, and May, 1900, partly before and partly after the ratification of the treaty of peace, but prior to the time the Foraker Act took effect. The court held, a majority concurring as in the *DeLima* case, that the duties were properly collected under the war power until the ratification of the treaty, but that the right to exact such duties ceased from the time the ratification took place. The same justices dissented as in the *DeLima* case, and reiterated in their opinion the declaration of Chief Justice Taney in *Fleming v. Page*, as materially modified, however, that

“in no single case from the foundation of the government except, if it can be called an exception, in the brief period prior to the President’s order enforcing the tariff laws in California, have the revenue laws of the United States been enforced in acquired territory without the action of the President or the consent of Congress, express or implied.”³

It will be observed that the express limitation of the Chief

1. 182 U. S. 182-6, 194, where the facts are fully stated in the opinion of Mr. Justice Brown.

2. 182 U. S. 222.

3. 182 U. S. 238.

Justice is to a special act of Congress as indispensable to the requisite change of a foreign to a domestic port, so that the revenue laws could take effect there as a part of the United States, is enlarged in this opinion to include the President, not only in connection with but also independently of Congress, as endowed with the power to extend the revenue laws to newly acquired territory. But there was far less justification for this judicial dictum than the earlier one of the Chief Justice. In the meantime Alaska had been purchased and ceded to the United States; and an interval of more than a year had elapsed after the ratification of the treaty and the delivery of the possession of the territory, before Congress extended the revenue laws to the new acquisition. During that interval the Secretary of the Treasury authorized goods shipped from Alaska to the port of New York to be received free of duty, and the Secretary of State concurred in this course of procedure. He said:

“I understand the decision of the Supreme Court in the case of *Harrison v. Cross*, 16 How. 164, to declare its opinion that, upon the addition to the United States of new territory by conquest and cession, the acts regulating foreign commerce attach to and take effect within such territory *ipso facto*, and without any fresh act of legislation expressly giving such extension to pre-existing laws. I can see no reason for a discrimination to this effect between acts regulating foreign commerce and the laws regulating intercourse with the Indian tribes.”

The dissenting opinion of Chief Justice Fuller in the *Downes* case, concurred in by three other members of the court, approved the decision of *Loughborough v. Blake*,¹ holding that the District of Columbia and the Territories were included in and formed a part of the United States and were subject to the constitutional provision conferring power upon

1. 5 Wheat. 317.

Congress to levy and collect taxes, duties, imposts and excises, and requiring that such taxes and duties shall be uniform throughout the country. In the language of the opinion,—

“Conceding that the power to tax for the purpose of territorial government is implied from the power to govern territory whether the latter power is attributed to the power to acquire or the power to make needful rules and regulations, those particular duties are nevertheless not local in their nature, but are imposed as in the exercise of National powers. The levy is clearly a regulation of commerce, and a regulation affecting the States and their people, as well as this territory and its people. The power of Congress to act directly on the rights and interests of the people of the States can only exist if, and as, granted by the Constitution. And by the Constitution Congress is vested with power to regulate commerce with foreign nations and among the several States, and with the Indian tribes. The Territories are indeed not mentioned by name, and yet commerce between the Territories and foreign nations is covered by the clause, which would seem to have been intended to embrace the entire internal as well as foreign commerce of the country.”¹

Again: The opposing “theory assumes that the Constitution created a Government empowered to acquire countries throughout the world, to be governed by different rules than those obtaining in the original States and Territories, and substitutes for the present system of republican government a system of domination over distant provinces in the exercise of unrestricted power.”² In this view the President and Congress may well be compared to battledores, and the Constitution to a shuttle-cock to be kept out of new territory, while the former govern or dispose of it without restraint or interference.

1. 182 U. S. 352-4.

2. 182 U. S. 373.

In reference to the bearing of international law on the case, this dissenting opinion of four members of the court further stated that

“the power of the United States to acquire territory by conquest, by treaty, or by discovery and occupation, is not disputed, nor is the proposition that in all international relations, interests and responsibilities the United States is a separate, independent and sovereign nation; but it does not derive its powers from international law, which, though a part of our municipal law, is not a part of the organic law of the land. The source of national power in this country is the Constitution of the United States; and the Government, as to our internal affairs, possesses no inherent sovereign power not derived from that instrument, and inconsistent with its letter and spirit. * * * The grant by Spain (concerning the civil rights and political status of the native inhabitants) could not enlarge the powers of Congress nor did it purport to secure from the United States a guaranty of civil or political privileges. Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would be simply void.”¹

There was still another opinion of special dissent by one of the four justices who concurred in the leading dissenting opinion in the Downes case, which may be characterized as an indignant protest against the decision of the court. This justice said:

“I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional require-

ment that all duties, imposts and excises imposed by Congress 'shall be uniform throughout the United States.' * * * The people of the United States who ordained the Constitution never supposed that a change could be made in our system of government by mere judicial interference. They never contemplated any such juggling with the words of the Constitution as would authorize the courts to hold that the words 'throughout the United States' in the taxing clause of the Constitution do not embrace a domestic 'territory of the United States' having a civil government established by the authority of the United States."¹

It thus appears that there were five different opinions delivered in the Downes case, three of which contained only the individual sentiments of their respective authors, although two of them were written by justices who concurred, one in the main concurring and the other in the leading dissenting opinion, in both of which other judges united. There were two principal opinions, each of which received the approval of four justices, and the opinion announcing the decision of the court which contained only the views of the writer as his personal reasons for his final conclusion; but this *conclusion* was adopted by five members of the court, holding that the special tariff act in question was valid and must be enforced. There was accordingly as stated by the reporter, "no opinion in which a majority of the court concurred."² But taking all the cases together, the court in its decisions adopted and approved two apparently contradictory propositions as follows: (1) That Porto Rico, on the ratification of the treaty of Paris and the evacuation of the island by Spain, leaving the United States in exclusive control and complete possession, *ipso facto*, became a part of the United States and was no longer a foreign country; so that our prior general revenue laws could no longer be enforced against shipments of goods

1. 182 U. S. 386-7.

2. 182 U. S. 244, note.

between the port of San Juan and other ports of the United States; (2) That Porto Rico nevertheless was not so completely identified with or merged in the United States as to be entitled to constitutional protection against the special legislation of the Foraker Act, subjecting goods transported between the same ports, despite the provision that "all duties shall be uniform throughout the United States," to other rates than those specified in the general tariff laws. Only one judge, however, concurred in all these decisions. The rule adopted for Porto Rico in the DeLima case was subsequently applied to the Philippines, the same justices, however, dissenting.¹ And in two later cases similar to that of Downes, the judgments were affirmed "on the authority of Downes v. Bidwell," the same justices, however, continuing their dissent.²

Ordinarily, dissenting judges, when the same question comes up again in litigated cases, yield to the authority of a prior decision in which they have been overruled, and the omission to follow this rule in the recognition of the DeLima and Downes cases is an indication that the dissenters in those cases did not regard the reasons therein assigned for the decisions as authoritative or conclusive, or the decisions as final. In several subsequent cases of a similar nature the justices respectively have endeavored to interject and maintain their own theories as stated in the former cases, reinforced by additional observations, with the evident purpose of procuring their acceptance by the court. Thus in *Hawaii v. Mankichi*³ two of the justices, White and McKenna, who had agreed in a special concurring opinion to the decision of the Downes case, concurred also in this case on the additional special ground that "the case was controlled by the

1. *Fourteen Diamond Rings v. U. S.*, 183 U. S. 176.

2. 191 U. S. 559, 560.

3. 190 U. S. 197.

decision in *Downes v. Bidwell*.”¹ And Mr. Justice Harlan, one of the four dissenting judges in the *Downes* case, all of whom also dissented in the *Mankichi* case, added, as an additional ground of his dissent in the latter case that within the rule stated in the leading concurring opinion of four judges, every provision in question of the Constitution was applicable to the Territory of Hawaii, and therefore controlling in the *Mankichi* case.² But the decision of the court in the latter case, in which five judges concurred, presents a flagrant case of judicial legislation.

Congress by a joint resolution annexed Hawaii to the United States July 7, 1898. The joint resolution recited that Hawaii had in due form “signified its consent to cede absolutely and without reserve to the United States all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public property;” and it was thereupon resolved

“that said cession is accepted, ratified and confirmed and that the said Hawaiian Islands and their dependencies be, and they are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America. * * * Until Congress shall provide for the government of such islands all the civil, judicial and military powers exercised by the officers of the existing Government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned. The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist or may be hereafter con-

1. *Id.* 219.

2. 190 U. S. 237-8.

cluded between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands not enacted for the fulfillment of the treaties so extinguished and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine. * * * The President shall appoint five commissioners * * * who shall as soon as reasonably practical recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper.”¹

The Secretary of State the next day (July 8) transmitted the joint resolution to the envoy of the United States at Honolulu with instructions

“ to accept in the name of the United States the formal transfer of the sovereignty and property of the Hawaiian Government and to raise the American flag. * * * In the exercise of the power thus conferred upon him by the joint resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath of allegiance to the United States, and all the military officers will be required to take a similar oath; and all bonded officers will be required to renew their bonds to the Government of the United States. * * * The municipal legislation of Hawaii, except such as was enacted for the fulfillment of the treaties between that country and foreign nations, and except such as is inconsistent with the joint resolution or contrary to the Constitution of the United States or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. * * * These instructions will be borne to you by Rear Admiral Joseph N. Miller, U. S. Navy, who will proceed to Honolulu in the U. S. S. Philadelphia, and who, together with the Commander of the United States military forces

1. 190 U. S. 222-3.

present, will act with you in the ceremonies attending the formal transfer of the islands to the United States.”¹

The formal transfer of sovereignty occurred and possession of the Hawaiian Islands was accordingly delivered to the United States on the 12th day of August, 1898, and the Chief Justice of Hawaii immediately administered the oath to all the public officers of the country “to support and defend the Constitution of the United States of America against all enemies, foreign and domestic.”² There was no other change in the laws of the new territory until April 30, 1902, when by an act of Congress Hawaii was organized as a Territory.³

In 1899 Mankichi was tried and convicted in a court of justice of Hawaii of the crime of manslaughter and sentenced to imprisonment for twenty years. He had not been indicted by a grand jury, and the verdict was rendered by only nine of the twelve persons composing the petit jury. The simple question was whether Mankichi had been legally convicted of an infamous crime; and the decision turned upon the interpretation of the provision in the joint resolution, continuing in force the municipal laws of the Islands, which were “not inconsistent with the joint resolution nor contrary to the Constitution of the United States.” The trial took place during the interval between the delivery of possession of the Islands and the transfer of sovereignty over them to the United States, and the enactment by Congress of the organic act of the Territory of Hawaii, a period of over twenty months. A majority of the court held, four judges dissenting, that notwithstanding the special exception contained in the joint resolution excluding laws contrary to the Constitution of the United States, the laws of Hawaii authorizing a

1. 190 U.S. 230-32.

2. *Id.* 233.

3. *Id.* 222, 234.

criminal prosecution to be instituted by an information allowed by the court, and a conviction by a vote not unanimous of the petit jury, remained in force at the time of the trial of Mankichi and that these laws required an affirmance of the judgment.

This conclusion was reached by applying the familiar rule of statutory interpretation that the intention of the law-making power as indicated by the general language of the act will prevail even against the letter of a single clause of the statute. But the intention must be clearly evident from the purpose and general tenor of the act, and the evil sought to be remedied; and it must be disclosed upon a comprehensive view of all the provisions of the statute; as in a comparison of the clause in question with the context and the general purport and aim of the enactment. The vital question in such a case is, what was the real intention of the legislature as disclosed in the act and the evil calling for a remedy?

“This intention affords a key to the sense and scope of minor provisions. From this assumption proceeds the general rule that the cardinal purpose or intent of the whole act shall control, and that all the parts be interpreted as subsidiary and harmonious. They are to be brought into harmony, if possible, and so construed that no clause, sentence or word shall be void, superfluous or insignificant.”¹

The authorities cited in the opinion of the court were clearly within this rule of interpretation, and afford no countenance or support to the reasoning of the court.

Thus in *Smythe v. Fisk*² it was held that the clause “not otherwise provided for” in a tariff act referred not to prior acts, but to the preceding enumeration of articles in the same section of the particular act. In *People v. Utica Insurance*

1. Sutherland on Statutory Construction, secs. 240, 241, and cases cited.

2. 23 Wallace, 374, 380, 381.

Co.¹ the court held that the act incorporating the defendant did not authorize the company to institute itself a bank, as banking powers had not been expressly granted therein, and were not within the intention of the legislature as collected from the act of incorporation. In *U. S. v. Kirby*² the court decided that an officer who arrested a mail carrier for murder under a warrant from a State court, was not guilty of "knowingly and wilfully obstructing or retarding the passage of the mail" contrary to an act of Congress, as the arrest was a lawful and not an unlawful act. In *Carlisle v. U. S.*³ it was held that the act of Congress authorizing and the President's proclamation granting pardon "to all and to every person who directly or indirectly participated in the late insurrection or rebellion" included aliens domiciled in the country who gave aid and comfort to those engaged in rebellion. In *Atkins v. The Disintegrating Co.*,⁴ the court decided that "a suit in admiralty" was not a "civil suit" within the prohibition against the service of criminal process upon an inhabitant in another district than where he resided or in which he should be found, as those phrases were used in the eleventh section and other sections of the judiciary act of 1789. The same question was decided in like manner in *In Re Louisville Underwriters*.⁵ In *Heydenfelt v. Dana Mining Co.*⁶ the court held that an ambiguous clause in the Nevada enabling act, reserving certain sections of public lands in the several townships to the new State for educational purposes, might be explained and interpreted by other provisions in the same act to ascertain the actual intention of Congress. In *Church*

1. 15 Johns. (N. Y.) 358.

2. 7 Wallace, 482-3.

3. 16 Wallace, 147.

4. 18 Wallace, 272.

5. 134 U. S. 488.

6. 93 U. S. 634.

of the Holy Trinity v. U. S.¹ it was held that the act of Congress prohibiting the importation or migration of aliens under contract to perform labor or service in the United States did not include clergymen or brain workers, as shown by the title to the act and by the evil it was designed to remedy, which disclosed an intention to limit the prohibition to unskilled labor. In *Lau Ow Bew v. U. S.*² the court held that the phrase "unless otherwise provided by law" in a statute was not limited to prior laws but included the provisions of the same law, as shown by the context.

But in the admission of Hawaii "as a part of the territory of the United States," so far from there being any indications of an intention on either side to limit the application of our constitutional provisions to the people of Hawaii, all the indications pointed in the opposite direction. A joint resolution of both houses of Congress adopted or approved by the President is equivalent to an act of Congress. The Hawaiian Islands therefore became with their consent a part of the United States. (1) Hawaii consented "to cede absolutely and without reserve to the United States all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands" and the ownership of all its public property. (2) This cession the United States "accepted, ratified and confirmed;" and Congress thereupon "annexed the Islands as a part of the territory of the United States" and subjected them to the "sovereign dominion thereof." (3) All the civil, judicial and military powers exercised by the officers of Hawaii were vested in such person or persons to be exercised as the President of the United States should direct; and were subject to his power of removal and of filling the vacancies. (4) The municipal legislation of Hawaii, "not inconsistent with this joint resolution, nor *contrary to the Constitution of the*

1. 143 U. S. 457.

2. 144 U. S. 47, 57.

United States * * * shall remain in force until the Congress of the United States shall otherwise determine."

This joint resolution was approved by the President; and the Secretary of State immediately issued instructions requiring, among other things, "the formal transfer of the sovereignty and property of the Hawaiian Government" to the United States, the recognition by Hawaii of the American flag, and that all public and military officers of the Islands take an oath of allegiance to the United States. These instructions were carried out, and each of those officers were duly sworn to support and defend the Constitution of the United States. It would be difficult to state in words or to confirm by acts a more definite and distinct intention of the parties in interest to invest forthwith the United States with the complete dominion and control *under the Constitution* of the Islands in question.

The only feature of the joint resolution referred to in the opinion of the court, as indicative of an intention to retain in force the laws of Hawaii relating to informations in criminal prosecutions and to jury trials, was that no change was made in the *name* of the Republic of Hawaii. There was no incongruity in the resolution in that respect, as there was no occasion for a formal change of name until the act was passed organizing the new acquisition as a Territory. Technically the United States is composed of States and Territories and the District of Columbia. But each of them, except the latter, considered separately or unitedly, is a republic, although the component parts of the Union may not be independent republics. The name therefore was of no significance, and its retention could not affect the interpretation of the positive provisions of the joint resolution, which specifically stated that *only* such prior legislation of Hawaii should remain in force as was "not inconsistent with the joint resolution, nor contrary to the Constitution of the United States." This

provision was either effective according to its terms, or ineffective. It is stated in the opinion of the court that one of the "main effects of the resolution" was "to continue the existing laws and customs regulations so far as they were not inconsistent with the resolution, nor contrary to the Constitution, until Congress should otherwise determine." And Congress had made no other provision on this or any other subject affecting Hawaii when Mankichi was tried and condemned.

It is conceded in the opinion that "any new legislation must conform to the Constitution of the United States." The joint resolution, however, only assumed to deal with prior or then existing legislation. It is also conceded that where no new legislation was required "to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect." But that was the exact situation in Hawaii under the joint resolution. The Hawaiian Code adopted the common law, with a proviso or amendment changing that law in reference to indictments by grand juries and to petit juries. The joint resolution annulled the proviso, leaving the common law in those respects under the Constitution in force, so that no new legislation was required in the prosecution of criminal cases.

The court further conceded argumentatively that Hawaiian legislation "allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for a public use without compensation," would not remain in force, even without new legislation, after annexation under the joint resolution. And the court added:

"We would even go farther and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexa-

tion; but we place our decision upon the ground that the two rights alleged to be violated in this case, are *not fundamental* in their nature.”¹

In other words a majority of the judges assumed and exercised the power of determining what provisions of the Constitution were or were not fundamental and held accordingly that those relating to and preserving the institutions of grand and petit juries were not of that character. The Constitution, however, is the fundamental law, and every provision in it is fundamental, and cannot be annulled, superseded, circumvented or ignored by any governmental authority. The court is authorized to interpret, but not to disregard or set at naught, any provision of the Constitution. Referring to the petit jury, Mr. Justice Story, in delivering the opinion of the court in an earlier case, pertinently observed that

“the trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. * * * One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people.”²

These impressive observations are equally applicable to grand and petit juries in criminal cases, as guaranteed in the fifth and sixth amendments of the Constitution. An indictment in a criminal case by a grand jury was ordinarily required, and in criminal as well as civil cases a unanimous

1. 190 U. S. 215-18.

2. *Parsons v. Bedford*, 3 Peters, 445.

verdict of a petit jury was indispensable at common law. The fifth, sixth and seventh amendments now require such an indictment in all criminal prosecutions except those arising in the military and naval forces, and retain the unanimity of petit juries in all cases. That these Constitutional provisions were in force in the Territories and the District of Columbia as well as in the States, had been repeatedly decided by the court in earlier cases.¹ Moreover, it is an elementary rule of statutory and constitutional interpretation that clear, unambiguous language must be given effect according to its natural meaning, and that a *casus omissus* cannot be supplied by the courts.²

Three justices acting with the majority of the court preferred to confine the discussion to the slender foundation of the exclusion from Hawaii of the Constitutional guaranties of grand and petit juries, as not involving fundamental rights, to reconsidering "the questions which arose in the Insular Tariff cases regarding the power of Congress to annex territory without at the same time extending the Constitution over it." But the other two members of the majority while concurring in the opinion of the court, to reach a decision, preferred to place their approval upon the further ground that Hawaii was not incorporated into the United States within the doctrine discussed in the principal concurring opinion in the Downes case.³ As only two judges, however, adopted that view in the Mankichi case no additional force was given to the questionable theories of that opinion.

In the later case of *Dorr v. U. S.*⁴ the exclusion of the con-

1. *Collen v. Wilson*, 127 U. S. 540, 550; *Reynolds v. U. S.*, 98 U. S. 145, 154; *Webster v. Reid*, How. 437, 460.

2. *Sutherland on Statutory Construction*, secs. 237-8, and numerous cases cited.

3. 190 U. S. 218, 219.

4. 195 U. S. 138-9, 144.

stitutional provisions relating to jury trials was extended to the Philippines on the authority of the Mankichi case. The author of the opinion of the court in the Dorr case made a strenuous effort to reaffirm also the doctrines of the principal concurring opinion in the Downes case. But this was superfluous as shown in the concurring opinion in the Dorr case of three of the justices. Their concurrence was placed distinctly upon the Mankichi case. In the language of the opinion,

“that case was decided by the concurring views of a majority of this court, and although we did not and do not concur in those views, yet the case is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands. But while concurring in this judgment we do not wish to be understood as assenting to the view that *Downes v. Bidwell* is to be regarded as authority for the decision herein. That case is authority only for the proposition that the plaintiff therein was not entitled to recover the amount of duties he had paid under protest for the importation into the city of New York of certain oranges from the port of San Juan in the island of Porto Rico in November, 1900, after the passage of the act known as the Foraker Act. The various reasons advanced by the judges in reaching this conclusion, which were not concurred in by a majority of the court, are plainly not binding.”¹

As the Mankichi case was an authority directly in point, the extended discussion of the views suggested in the opinion cited from the Downes case was clearly *obiter*. The persistent effort, however, of the author of the leading opinion in the Dorr case to obtain the recognition of the Downes case in all its aspects as a legal authority may be attributed to his natural, and, perhaps, pardonable desire to secure, if pos-

1. 195 U. S. 153-4. The decision in the Dorr case was reaffirmed in *Dowdell v. U. S.*, 221 U. S. 225, 332.

sible, judicial sanction and approval of his own diplomacy in negotiating the treaty which has been the source of so much controversy and litigation. But another opinion dissenting from the decision of the court was also delivered in the Dorr case on the broad ground that "the Constitution is the Supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction."¹

The latter view, thus forcibly expressed in dissent, was in strict accordance with prior decisions of the court. The Territorial legislature of Iowa in 1839 passed a special act authorizing civil actions in favor of certain claimants for services against a tribe of half-breed Indians, and provided that "the trial of said suits shall be before the court and not a jury." Actions were commenced and tried accordingly, and judgments recovered for considerable sums of money, upon which executions were issued and large tracts of land sold. In the subsequent action involving the validity of the title to the lands thus acquired the court unanimously decided that the judgments obtained in this manner were nullities for the reason among others that the Territorial Act was void because it "prohibited the trial by jury in matters of fact on which the suits were founded."² The Constitution had not been formally or indirectly extended to that Territory but its provisions relating to trial by jury were still held to be in force there. In later cases³ involving the validity of a provision in the organic act of the Territory of Utah, claimed as authorizing the Territorial legislature "to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict," the Territorial court sus-

1. 195 U. S. 157.

2. *Webster v. Reid*, 11 How. 437, 448-60.

3. *Springville v. Thomas* and two other cases, 166 U. S. 707-9.

tained in that view the constitutionality of the act of Congress. But the judgments were reversed on appeal to the Supreme Court, on the ground that "in this there was error. In our opinion (the court added) the seventh amendment of the Constitution secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases, and the act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so." In a still later criminal case¹ where a person was indicted and convicted of a felony in a Territorial court of Utah by a unanimous verdict of a jury of twelve men, which was set aside and a new trial granted, but the second trial did not take place until after the admission of the Territory as a State, and under the State Constitution the second jury was composed of only eight persons, it was held by the Supreme Court, reversing the judgment of the State Court, that "the provision in the Constitution of Utah providing for the trial in a court of general jurisdiction of criminal cases not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the Territory became a State, because, in respect of such crimes, the Constitution of the United States gave the accused, at the time of the commission of the offence, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."²

Recurring to the line of decisions relating directly to the inherent force of the Constitution in the new Territories, the next case is *Rasmussen v. U. S.*³ In this case it was held that Alaska at the time of its cession to the United States in the treaty with Russia became an integral part of the Union and

1. *Thompson v. Utah*, 170 U. S. 343.

2. 170 U. S. 355.

3. 197 U. S. 516.

that the sixth amendment of the Constitution took immediate effect therein. The author of the leading opinion also wrote the principal concurring opinion in the *Downes* case, and endeavored to make the principles announced in that opinion controlling in the decision. He maintained that under the treaty Alaska was within his special doctrine actually incorporated into the United States, simply because an intention was manifested in the terms of the treaty to admit the inhabitants to the enjoyment of American citizenship. But the Constitution was in force in Alaska within the principles discussed in all the opinions of concurrence or dissent in the insular cases, including the dissenting opinions in the *Downes* case, and therefore there was no dissent and no reason for dissent in the *Rasmussen* case. The Constitution was in force in Alaska instantaneously upon its acquisition, and neither the executive nor Congress nor the Supreme Court, as mere creatures of the Constitution, did or could rightfully debar its dominion there, as "the supreme law of the land." The statement, however, in the leading opinion, in support of the theory of incorporation, that the Constitution had been extended by legislation into all the Territories in which the cases cited were concerned, was clearly erroneous, as the Constitution had not been extended by Congress to the Territory of Iowa, where the case of *Webster v. Reid*¹ arose; and in one of the cases cited from Utah² the organic act, in so far as it was claimed to have authorized the Territorial legislature "to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict," was held to be ineffectual, as "Congress could not impart the power to change the constitutional rule."

It is worthy of observation that the act of Congress of 1902 creating a civil government in the Philippine Islands, de-

1. 11 Howard, 437.

2. *Springville v. Thomas*, 166 U. S. 708-9.

clared that section 1891 of the Revised Statutes of the United States of 1878 extending the Constitution to all the Territories, should not apply to or have any force or effect in the Islands. The organic act, however, provided for and enacted as part of the Territorial law the language of the old bill of rights contained in the first nine amendments of the Constitution with the exceptions of the provisions preserving the right of trial by jury and the right of the people to bear arms. But that statute had not been passed when the offense which was involved in the Dorr case was committed, and the decision in that case was based upon the theory announced in the Mankichi case, that the constitutional guaranty of trial by jury was not in force in the Territory and in any event was not a fundamental provision.

CHAPTER V.

JURISDICTION CONTINUED.

The judicial power as extended by the organic law comprehends jurisdiction of all forensic controversies involving the validity of executive and legislative acts under the Constitution.

The judicial power of the United States is vested in the Supreme Court and such inferior courts as have been established by Congress.¹ This power is not identical with that of England or of any other European nation, but is distinctly "the judicial power of the United States" as ordained in the Constitution. The important provision of that instrument, as to subject matter, is that "the judicial power *shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority;*" and, as to the parties, that it shall extend to cases in which the United States, or a State, or a foreign state, is one of the parties, and to cases between two or more States, or the citizens of different States or citizens and foreigners.² There is no exception or exclusion of cases presenting questions of a political nature or involving official acts of the political departments of the Government. Whenever political acts, legislative, executive or administrative, are assailed in legal proceedings as the proximate cause of injury and resulting damage, and as unauthorized by or in violation of "the supreme

1. Art. 3, sec. 1, sub. 1.

2. Art. 3, sec. 2, sub. 1.

law of the land " they are made justiciable; and the natural interpretation and proper conclusion is that whether they are the personal or official acts of the President or of his subordinates, or are directly authorized by Congress, the court is vested with the power in a pending suit at law or in equity involving their constitutionality, of investigating and deciding whether they are valid or void. It is only essential to the jurisdiction that a competent suitor has suffered a direct wrong or injury from some definite official or governmental act, averred to have been inflicted in violation of the Constitution. If, however, the claim for redress is based entirely upon a grievance resulting indirectly from the operation of a general or particular line of public policy pursued in relation to the domestic or foreign affairs of the government, the origin of the wrong or cause of the injury is too remote and speculative or uncertain for judicial recognition, and the case falls under the doctrine of *damnum absque injuria*. There is in such a case no tangible ground of liability at law or in equity. The criterion, therefore, is not that the question is or is not of a political nature, but whether it is justiciable, and may accordingly be traced, examined and verified to a moral certainty, and a remedy be afforded by applying the principles and rules of law or of equity. The general conclusion may therefore be stated as follows: A political question becomes subject to the judicial power whenever it involves the inquiry whether the particular act of the executive or of the legislature is or is not in violation of any provision of the Constitution.

This was the view taken in the Convention of 1787 when the overture was offered to extend the jurisdiction of the court to all the cases arising under the Constitution as well as under the laws and treaties of the United States. The clause as to laws and treaties had as then approved been apparently completed when Mr. Johnson, of Connecticut, moved to

amend it by inserting the words "this Constitution," as in its present form. Mr. Madison "doubted whether it was not going too far to extend the jurisdiction of the court generally to cases arising under the Constitution." Upon further consideration, however, the motion was unanimously adopted upon the theory, as stated by him, "that the jurisdiction given was constructively limited to cases of a judiciary nature."¹ What, then, is a case of a judiciary nature? Manifestly, it is any controversy between competent parties concerning a claim of any conceivable and tangible character, involving a question of law or fact, relating to public or private affairs, with which the parties have or have had some connection, and from which it is averred some right or interest has been impaired or injury sustained causing loss or damage.

Doubtless in England or in any country where the judiciary derive their being entirely from the executive or the legislature, it might be claimed that the courts have no jurisdiction to supersede or question the acts of the superior power. The subordinate may not overrule the sovereign. But the judiciary of the United States under the Constitution is not subordinate but equal to and independent of the executive and legislative branches of the Government. The Supreme Court is indeed vested with the whole judicial power as extended and enlarged in the organic law, including "all cases" arising under it, or involving its application and interpretation, as well in the exercise of governmental functions as in private transactions. In the language of counsel *arguendo* for the State of Rhode Island in its territorial controversy with Massachusetts,²

"if this jurisdiction is vested in the court by the Constitution,

1. 2 Ferrand's Records of Federal Convention, 430.

2. 12 Peters, 692.

how preposterous is it to talk of the nature of the controversy or the character of the parties! Suppose the controversy is political in its nature: what then? Is there any reason in nature why it should not be subjected to judicial investigation and decision, as much as any other controversy? Suppose the parties to it are two States: what then? Is there any reason in nature why they should not be governed by the laws and principles of justice, as much as any other parties? All controversies, whatever their character and whoever the parties, if they are ever settled, and the parties will not settle them amicably, must be settled either by force or by the judgment of some tribunal. When the controversy is between sovereigns, the sword is the last resort, the '*ultima ratio regum*;' and the contest is waged at the expense of the blood and lives of their subjects. But if the controversy is submitted to some independent tribunal, that tribunal, call it by whatever name we may, must act judicially."

This view was sustained by the court. It was undisputed that the question at issue between the States was merely the right of sovereignty as neither State claimed title to the soil in the disputed territory; and it was conceded that the controversy was strictly of a political nature. The court, after an extended preliminary discussion, announced the following conclusion:

"There is neither the authority of law or reason for the position that boundary between Nations or States is, in its nature, any more a political question than any other subject on which they may contend. None can be settled without war or treaty, which is by political power; but under the old and new confederacy they could and can be settled by a court constituted by themselves, as their own substitutes, authorized to do that for States, which States alone could do before. We are thus pointed to the true boundary line between political and judicial power, and questions. A sovereign decides by his own will, which is the supreme law within his own boundary; a court or judge decides according to the law prescribed by the sovereign power, and that law is the rule for judgment. The submission by the sovereigns or States to a court of law or equity of a controversy between them,

without prescribing any rule of decision, gives power to decide according to the appropriate law of the case; which depends on the subject matter, the source and nature of the claims of the parties, and the law which governs them. From the time of such submission, the question ceases to be a political one to be decided by the *sic volo, sic jubeo*, of political power; it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question, depending on the exercise of judicial power; as it is bound to act by known and settled principles of national or municipal jurisprudence, as the case requires. * * * These considerations lead to the definition of political and judicial power and questions; the former is that which a sovereign or State exerts by his or its own authority, as reprisal and confiscation; the latter is that which is granted to a court or judicial tribunal. So of controversies between States; they are in their nature political, when the sovereign or State reserves to itself the right of deciding on it; makes it the 'subject of a treaty, to be settled as between States independent,' or 'the foundation of representations from State to State.' This is political equity to be adjudged by the parties themselves, as contradistinguished from judicial equity administered by a court of justice, decreeing the *equum et bonum* of the case, let who or what be the parties before them."¹

Chief Justice Taney dissented from this decision. The case was heard by the court preliminarily upon the facts alleged in the pleadings, and was elaborately argued three times before the final hearing upon the evidence; first, upon a motion to dismiss the complaint on the ground that the court had no jurisdiction of such a controversy; second, upon a plea in bar setting forth additional facts to oust the jurisdiction of the court; and third, on a demurrer to the complaint as not containing facts sufficient to constitute a cause of action. The court denied the motion and overruled the special plea and the demurrer. The Chief Justice, notwithstanding his dissent from the decision in favor of jurisdic-

1. 12 Peters, 737-8.

tion, concurred in the subsequent decisions before the final hearing and delivered the opinions of the court overruling the special plea and the demurrer.¹ An answer was then interposed to the complaint, and upon the final hearing the case was again argued at length and then decided against the plaintiff on the merits. The Chief Justice concurred in the final decision dismissing the complaint upon the distinct ground, however, "that the court under the Constitution of the United States, have not the power to try such a question between States, or to redress such a wrong even if the wrong is proved to have been done."² The apparent inconsistency of the course pursued by the Chief Justice was not explained in his opinions. If, as he insisted, the court had no jurisdiction of the case, it had no more power to determine the validity of the plea in bar or of the demurrer to the complaint than to decide the merits of the controversy, and he should have declined to pass upon those issues as well as upon the merits.

The decision of the court is in strict accordance with the rule that when a political question is submitted by the sovereign power or by the fundamental law to the decision of a court of justice, "it ceases to be a political one;" "it comes to the court to be decided by its judgment, legal discretion, and solemn consideration of the rules of law appropriate to its nature as a judicial question," to wit: the "known and settled principles of national or municipal jurisprudence as the case requires." Indeed the Chief Justice seems in subsequent cases to have abandoned his dissenting doctrine, as he concurred in the later decision upholding and exercising the jurisdiction in the case of *Missouri v. Iowa*,³ and delivered

1. 14 Peters, 210, 251; 15 Peters, 233, 269.

2. 4 Howard, 640.

3. 7 Howard, 660.

the opinion of the court in *Florida v. Georgia*,¹ in which he stated

“that a question of boundary between States is in its nature a political question to be settled by compact made by the political departments of the government. * * * But under our government a boundary between two States may become a judicial question, to be decided by this court.” “And it is settled by repeated decisions that a question of boundary between States is within its jurisdiction.”

The authority of the leading opinion in *Rhode Island v. Massachusetts* upon this question of jurisdiction under the Constitution to entertain and determine between States a political point in dispute, is now too firmly established to be open for further discussion in the courts.² The rule has latterly been extended to include within the original jurisdiction of the court even a case involving a disputed boundary line in which the United States is a party against a State, although States only are mentioned in that connection in the Constitution, while the United States is named merely as a proper party in controversies of which the court has appellate jurisdiction.³

The court, indeed, after much hesitation and one distinct refusal to sustain an action brought by one State as *parens patrie* or representative of its citizens against another State to enjoin or abate a nuisance,⁴ has in more recent cases assumed and exercised jurisdiction of controversies between two States, *first*, to enjoin the creation or continuance of a nuisance, sanctioned by State legislation within the State, as

1. 17 Howard, 478, 491, 494.

2. *Virginia v. West Va.*, 11 Wallace, 39, 53-5; *Virginia v. Tennessee*, 148 U. S. 503-4; *Indiana v. Kentucky*, 136 U. S. 479; *Maryland v. W. Va.*, 217 U. S. 1, 517; *Louisiana v. Mississippi*, 202 U. S. 1, 35-6.

3. U. S. v. *Texas*, 143 U. S. 621; U. S. v. *Michigan*, 190 U. S. 396.

4. *Louisiana v. Texas*, 176 U. S. 1.

dangerous and detrimental to the health of the inhabitants of an adjoining State;¹ *second*, to enjoin and prohibit one State, in which a navigable river has its source, from undue and excessive appropriation and use of the waters accustomed to flow in the stream while passing through and across its territory, and the consequent destruction of property, or injury to the health and comfort of the citizens of another State;² and, *third*, prohibiting at the suit of a State a corporation of another State from discharging from its corporate works over the territory of the complainant noxious fumes which threaten damage on a considerable scale to the forests and vegetable life, if not to health, within the State seeking such relief.³

In the first case the court, after upholding its jurisdiction and overruling a demurrer, at the final hearing dismissed the complaint on the merits. But it still maintained its jurisdiction as "not open to doubt." In disposing of the demurrer, and referring to the case of *Rhode Island v. Massachusetts*, the court said

"that the principal contest was as to whether a question of boundary, involving as it did the question of sovereignty over territory, was a judicial question of a civil nature. The implication was that the controversies between two or more States, in which jurisdiction had been granted by the Constitution, did not include questions of a political character. In some of the later cases the contention has been the very opposite; that the intention of the Constitution was only to apply to questions in which the sovereign and political powers of the respective States were in controversy."

And after an exhaustive analysis of the authorities, the court added:

1. *Missouri v. Illinois*, 180 U. S. 208.

2. *Kansas v. Colorado*, 185 U. S. 208.

3. *Georgia v. Tennessee Copper Co.*, 206 U. S. 230.

“The cases cited show that such jurisdiction has been exercised in cases involving boundaries and jurisdiction over lands and their inhabitants, and in cases directly affecting the property rights and interests of a State. But such cases manifestly *do not cover the entire field in which such controversies may arise, and for which the Constitution has provided a remedy.* * * * An inspection of the bill discloses that the nature of the injury complained of is such that an adequate remedy can only be found in this court at the suit of the State of Missouri. It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.”¹

In the final decision, the court reaffirmed its jurisdiction as follows:

“The nuisance set forth in the bill was one which would be of international importance, a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union this court was competent to deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be on matters of detail, the jurisdiction and authority of this court to deal with such a case as that is not open to doubt.”²

In the second case above referred to, Chief Justice Fuller, who had dissented from the decision in *Missouri v. Illinois*,

1. 180 U. S. 226, 240-1.

2. 200 U. S. 518.

delivered the opinion of the court in overruling the demurrer; and, adverting to the prior case, said:

“The court there ruled that the mere fact that a State *had no pecuniary interest* in the controversy, would not defeat the original jurisdiction of the court, which might be invoked by the State as *parens patrie*, trustee, guardian or representative of all or a considerable portion of its citizens; and that the threatened pollution of the waters of a river flowing between States, under the authority of one of them, thereby putting the health and comfort of the other in jeopardy, presented a cause of action justiciable under the Constitution.”

And after considering the leading authorities, he added concerning the case at bar:

“Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former, and, by nature, flowing into and through the latter, and that, therefore, this court speaking broadly, has jurisdiction.”¹

The court, in the final decision, reaffirmed more explicitly the nature and extent of its jurisdiction, but in view of all the evidence, *held*, that the detriment to lands in the State of Kansas from the diminution of the flow of water therein by the diversion of water from the river in Colorado for purposes of irrigation of arid lands in that State, was not sufficient to amount to an inequitable apportionment of the water between the two States and the complaint was therefore dismissed, but without prejudice to a right of action whenever by a material increase in the depletion of waters from the river in the State of Kansas caused by such diversion, its substantial interests were injured to the extent of

1. 185 U. S. 142, 145.

destroying the equitable apportionment of benefits between the two States.¹

In rendering the decision, the opinion of the court, referring to the grant in the Constitution of the judicial power to the Supreme and such other inferior courts as Congress may organize, distinctly stated that it "is not a limitation, nor an enumeration," as is clearly the case with the provisions conferring the legislative power upon Congress, "by reason of the fact that there is no general grant of legislative power" to that branch of the government. On the contrary the judicial provision

"is a definite declaration, a provision that the judicial power shall extend to—that is, shall include—the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power. There may be, of course, limitations on that grant of power, but if there are any they must be expressed, for otherwise the general grant would vest in the courts all the judicial power which the nation was capable of exercising." "Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, the parties to which or the property in which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts *all the judicial power which the nation was capable of exercising was vested in those tribunals*, and unless there be some limitations expressed in the Constitution it must be held to embrace *all controversies of a justiciable nature* arising within the territorial limits of the nation, *no matter who may be the parties thereto*." "These considerations lead to the proposition that when a legislative power is claimed for the National government the question is whether that power is one of those granted by the Constitution, either in terms or by necessary implication, whereas in respect to judicial functions the question is whether there be any limitations expressed in the Constitution in the general grant of National power."¹ "Turning now to the controversy as here presented,

1. 206 U. S. 47, 117.

2. 20 6U. S. 81-84.

it is whether Kansas has a right to the continuous flow of the waters of the Arkansas river as that flow existed before any human interference therewith, or Colorado has the right to appropriate the waters of that stream so as to prevent that continuous flow, or that the amount of the flow is subject to the superior authority or supervisory control of the United States."

Concerning the contention of the United States, the court held that as the appropriation of the waters in Colorado did not affect the navigability of the stream in Kansas the General Government could not intervene in the case. The opinion then continued :

"Now the question arises between two States, one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of the public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. A stream flows through the two and a controversy is presented as to the flow of that stream. It does not follow, however, that because Congress cannot determine the rule which shall control between the two States or because neither State can enforce its own policy upon the other, that the controversy ceases to be one of a justiciable nature, or that there is no power which can take cognizance of the controversy and determine the relative rights of the two States. Indeed, the disagreement, coupled with its effect upon a stream passing through the two States, makes a matter for investigation and determination by this court." "One cardinal rule underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever the action of one State reaches through the agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them."¹

In the third case to which special reference has been made, the court was still more emphatic in its recognition and enforcement of the rule regulating relief in actions brought by a State for interference with the rights of its citizens. The court said:

“ This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the title of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants breathe pure air. * * * When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi-sovereign* interests; and the alternative to force is a suit in this court.” “ It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.”¹

There are other decisions in which the court has applied the same rule in the exercise of its appellate jurisdiction. Thus, where the validity of State legislation regulating the manner of appointing or electing presidential electors and prescribing their course of proceeding, was involved, it was held that the court had jurisdiction of the case. Chief Justice Fuller, in announcing its unanimous judgment, said:

“ It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions con-

1. 206 U. S. 237, 238.

nected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the State board of canvassers, the legislature in joint convention, and the governor, or, finally, the Congress. But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising since the validity of the State law was drawn in question as repugnant to such Constitution and laws, and its validity was sustained. * * * The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the State as revised by our own.”¹

The court in an earlier case reached the same conclusion. Construing the 25th section of the first judiciary act as conferring upon it without limitation all of the jurisdiction authorized by the organic law, Chief Justice Marshall, speaking for the court, gave the following interpretation to the general clause extending the judicial power to all cases arising under the Constitution:

“A case in law or equity consists of the right of one party as well as the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either. * * * The jurisdiction of the court, then, being extended by the letter of the Constitution to all cases arising under it, * * * it follows that those who would withdraw any case of this description from that jurisdiction, must sustain the exemption they claim, on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to override the words which its framers have employed. * * * The General Government though limited as to its objects is supreme with respect to those objects. This principle is a part of the Constitution; and if there

1. *McPherson v. Bleeker*, 146 U. S. 23, 24.

be any who deny its necessity, none can deny its authority. * * * The maintenance of these principles in their purity is certainly among the great duties of the Government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description, arising under the Constitution and laws of the United States. * * * It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the Constitution. * * * We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. * * * All we can do is to exercise our best judgment, and conscientiously perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception in the grant and we cannot insert one.”¹

These views were reiterated by Chief Justice Marshall on behalf of the court in *Osborne v. U. S.*² of which it assumed jurisdiction under the same statute. Referring to the general clause above mentioned, he said:

“This clause makes the judicial department (competent) to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power extends to all cases arising under the Constitution, laws and treaties of the United States.”

The court in another later case, of which it also assumed

1. *Cohens v. Virginia*, 6 Wheat. 379, 383, 391-3, 404.

2. 9 Wheat. 819.

appellate jurisdiction under the twenty-fifth section of the first judiciary act, emphatically reaffirmed this interpretation of the constitutional provision in question. Chief Justice Taney, in the opinion of the court, said:

“The Constitution, in conferring judicial power upon the Federal Government, declares that the jurisdiction of the courts shall extend to all cases arising under this Constitution and the laws of the United States, leaving out the words of restriction contained in the grants of legislative power. * * * The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated power, or be an assumption of power beyond the grants in the Constitution. * * * And no one can fail to see that if such an arbiter had not been provided in our complicated system of government, internal tranquility could not have been preserved; and if such controversies were left to arbitrament of physical force, our Governments, State and National, would soon cease to be governments of laws, and revolutions by force of arms would take the place of courts of justice and judicial decisions. * * * This tribunal, therefore, was erected and the powers of which we have spoken conferred upon it, not by the Federal Government, but by the people of the States, who formed and adopted that Government, and conferred upon it all the powers, legislative, executive and judicial, which it now possesses. And in order to secure its independence, and enable it faithfully and firmly to perform its duty, it engrafted it upon the Constitution itself, and declared that this court shall have appellate power in all cases arising under the Constitution and laws of the United States.”¹

“The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land.”²

There are still other decisions of the court relating to the judicial power which do not, however, recognize or follow

1. *Ableman v. Booth*, 21 Howard, 520, 521.

2. *Smyth v. Ames*, 169 U. S. 528.

any clear or consistent rule of interpretation of the Constitutional provisions. These particular provisions are plain, definite and comprehensive, and their meaning, if construed in the broad sense which has generally been applied to the organic law, is obvious and unequivocal. The same rule of interpretation ought to be and is applicable to every clause of the general provision conferring jurisdiction upon the court, and that rule is elementary. It may be stated in the language of Mr. Justice Story on behalf of the court in *Martin v. Hunter*.¹

“The Constitution unavoidably deals in general language.” “This instrument, like every other grant is to have a reasonable construction, according to the import of its terms; and where a power is expressly given in general terms it is not to be restrained to particular cases, unless that construction grows out of the context, expressly or by necessary implication. The words are to be taken in their natural or obvious sense, and not in a sense unreasonably restricted or enlarged.”

If this rule of interpretation be applied to the clause extending the judicial power “to controversies between two or more States,” to which it is equally applicable and to the other clauses of extension, and especially to the clauses relating “to controversies to which the United States shall be a party,” as well as to the important preliminary clause providing that the “judicial power *shall* extend to *all* cases in law and equity arising under this Constitution,” the way is clear to a reasonable and consistent exposition of the essential nature and extent under our system of government of the judicial power. Unfortunately, the decisions involving the interpretation of some of the clauses in the grant extending the judicial power were made in earlier cases before the court had grasped the broad view of the clause concerning controversies

1. 1 Wheaton, 326.

between States announced in the decisions above cited, and before the judges had liberated themselves from the narrow and technical rule of the civil and of the common law, formulated under monarchical governments, when the judiciary were merely the creatures of the throne or of the legislature, as the superior powers in the state. The observation, however, is pertinent that a very early decision in *Chisholm v. Georgia*,¹ in interpreting still another clause in the grant of the judicial power—the clause of extension to controversies “between a State and citizens of another State,”—may be regarded as an exception to the earlier decisions referred to. That decision it is true was overruled as a decisive authority on the particular point involved, the suability of a State by a citizen of another State, by the eleventh amendment of the Constitution. But that amendment did not change or affect the rule of construction applicable to the other clauses of extension of the judicial power, nor even of the particular clause in question as to the right of the State to sue a citizen of another State.² And that case will later receive more extended examination as embodying the only sound and sensible rule of interpretation of these Constitutional provisions.

It was stated by Mr. Justice Miller, as the result of all the later decisions, in *Cunningham v. Macon, etc., R. Co.*³ that it may be accepted as a point of departure unquestioned, that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court.

1. 2 Dallas, 419.

2. *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518-19, 559; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 287.

3. 109 U. S. 451.

The Court, moreover, in this and other cases, after a good deal of vacillation, has extended this departure from sound doctrine to the inclusion also of officers of a State or of the United States, having property in their possession or under their control, as such officers, which is shown to be owned by the State or the Nation. The Cunningham case was heard on a demurrer to the complaint, in which it was alleged in substance "that no valid title had passed to the State," and "that the property, although held by officers of the State as her absolute property, was not rightfully so held;" so that the facts were undisputed. It was accordingly admitted that the Governor of the State was authorized to perform all proper and necessary acts to accomplish the end in view, and he in fact entered into all the contracts and directed all the proceedings, including the appointment of a receiver, in *his own name*; and he also caused a sale to be made by the receiver of the property nominally to the State, retaining, however, actual possession; and the action was brought against *him* to obtain proper equitable relief, on the ground that his proceedings were illegal as in contravention of the statute. It was held, however, that the State was the real party in interest, and that the Federal courts had no jurisdiction. Judge Miller, in the opinion of the court, endeavored to classify the earlier leading cases on the subject, but frankly "confessed" that "it was no easy matter to reconcile all the decisions of the court." Two of the justices dissented from this decision, and relentlessly pointed out the inconsistencies of the decision with the prior judicial precedents.

Only the year before the Cunningham case was decided, Mr. Justice Miller had written the opinion of the court in *Kaufman v. Lee*,¹ where it was held that an action could be maintained by a citizen to recover property purchased at a

1. 106 U. S. 196.

tax sale in the name of the United States, of which it accordingly claimed to be the owner, and which was used pursuant to an act of Congress, under the management and control of Kaufman as an officer or agent of the Nation, for a National cemetery; and it was claimed by the attorney general as public property owned by the United States in the exercise of its sovereign power. Judge Miller's opinion in this case contains a thorough and masterly discussion of the question of jurisdiction upon principle and the authorities; and it certainly was not answered by his very unsatisfactory and even apologetic opinion in the Cunningham case.

Judge Miller also concurred in the opinion of the Court in *Davis v. Gray*,¹ in which it was distinctly decided that

“where the State is concerned, the State should be made a party if it could be done. That it cannot be done (since the adoption of the eleventh amendment to the Constitution) is a sufficient reason for the omission to do it, and the court may proceed to decree against the *officers* of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case.”²

This decision was made in 1872, barely ten years before that in the Lee case, and is in accordance with the practice of a court of equity between individuals and corporations in similar cases. Judge Miller endeavored in the Cunningham case to distinguish the case of Lee as merely an action of tort, remarking that as an action of ejectment it was “in its es-

1. 16 Wallace, 203.

2. 16 Wallace, 220.

sential character an action of trespass.”¹ But he did not so regard it in his opinion in that case. He then said:

“The action was originally commenced in the circuit court for the county of Alexandria in the State of Virginia * * * to recover possession of land of about 1100 acres known as the Arlington estate. It was in the form prescribed by the statutes of Virginia, under which the pleadings are in the names of the real parties, plaintiff and defendant. As soon as the declaration was filed, the case was removed into the circuit court of the United States where all the subsequent proceedings took place.” “The plaintiff offered in evidence, establishing title in himself, the will of his grandfather who devised the Arlington estate to his daughter, the wife of General Robert E. Lee, and after her death to the plaintiff. * * * The title relied on by the defendant is a tax sale certificate made by the commissioners appointed under an act of Congress. * * * At this sale the land was bid in for the United States by the commissioners, who gave a certificate of that fact, which was introduced on the trial as evidence by the defendant. If this sale was valid and the certificate conveyed a valid title, then the title of the plaintiff was thereby divested, and he could not recover.”²

The action therefore was brought not to enforce the common law remedy after a wrongful eviction, but to settle a disputed title to real estate both of the real parties in interest, the United States, and the original plaintiff, claiming ownership of the land in fee simple. The law of Virginia, which was controlling, had abolished the former remedy of a writ of right for determining between contestants the title to real estate, and substituted the action of ejectment for that purpose. Under the local law, therefore, the Lee case was not an action of trespass, nor merely to recover possession or damages for a violent eviction, but essentially a “real action” to “try the question of the validity of the title” to

1. 109 U. S. 452.

2. 106 U. S. 197-9.

the lands in question, as distinctly pointed out in the dissenting opinion of Mr. Justice Gray,¹ in which three other members of the court concurred.

Again, in the Cunningham case the State statute authorized the governor to endorse the bonds of a railroad company, and the bonds so endorsed were negotiated and transferred to purchasers. The endorsement of the governor operated under the statute as a prior mortgage upon the railroad property, which the governor was authorized on default in payment of principal or interest, to enforce by foreclosure and sale. A default having occurred in the payment of interest, the governor took possession and finally sold the property, bidding it in himself for the State, and conveyed it accordingly to the State. The bill of complaint alleged that the governor had no authority to bid in the property and that his proceedings in making the sale for various reasons set forth in detail were invalid, so that no title passed under the foreclosure and sale. It was held that the court had no jurisdiction, as the State was a necessary party, and that no relief therefore could be granted to the company. In the case of Lee, the Federal statute allowed the *owner or owners* of the lands within sixty days after the amount of the tax assessed and charged therein had been fixed, to pay the same to the commissioners and take a certificate of such payment, by virtue of which the lands should be discharged from the tax. The owner, however, did not pay or offer to pay the tax, but a third person tendered the amount thereof to the commissioners, which was declined as not made by the owner. The statute required the commissioners in case the tax had not been paid by the owner to advertise and sell the property, and authorized the commissioners, if the owner did not appear in person on or before the day of sale and pay the tax with the

1. 106 U. S. 225, 234-5.

penalty prescribed for prior nonpayment and costs, "to bid off the same for the United States." The tax was assessed and the sale made pursuant to the statute, the commissioners complying literally with its terms in rejecting a tender of payment not made by the *owner*, and for ten years the United States used the property for the burial of deceased soldiers and sailors, Kaufman having charge of the cemetery subject to the orders of the War Department. And yet the court, holding that the tender of the tax by a third person was equivalent to payment by the owner, and that the United States was not a necessary party to the action, adjudged that the plaintiff was entitled to recover the title to and possession of the property. As in the Cunningham case the nominal title was in the State, and in the Lee case was in the United States, and as both actions were brought only against public officers, and in both the title was attacked as ineffective because the officers sued were guilty of unauthorized acts in attempting to transfer it to the governmental body, it is difficult to perceive why the same rule as to a supplemental party was not equally applicable to and controlling in both cases. The same decision was rendered in the Lee case against the other defendant Strong, who had charge of nearly all the residue of the land in controversy, subject to the orders of the War Department, which was occupied and used at the time as a fort and military station under the direction of the President, as the commander in chief of the army.

The only real distinction between the Cunningham and Lee cases is founded upon a mere technicality, to wit: that in the Cunningham case, the officers of the State were named officially as defendants, whereas in the Lee case the officers were named defendants as individuals. In the latter case, however, the defendants averred as their defence that they were acting throughout as officers and not otherwise, and had no personal interest in the matter, and it was undisputed that

such were the facts. The decision therefore holds in effect that the plaintiff's assertion of the official character of the opposite party to the suit is of more importance than the defendant's averment of his own relation to the controversy—may more, that it is conclusive and not only bars the defendant from availing himself of his real defence, but actually determines whether the United States is or is not in effect also a party to the litigation. In this view the plaintiff may decide the question irreversibly at the outset whether an action brought to recover for an injury to himself or to his property from governmental acts is in effect also a suit against the State or the United States.

This formal and arbitrary distinction, however, has been emphasized as a pivotal point in several later cases. Thus in *Tindal v. Wesley*¹ in which the defendants were sued as individuals, one of them was Secretary of State of South Carolina, and the other was his employe as such officer, and the acts complained of were averred to have been performed by them respectively as such officer and employe, and the State was the real owner of the property in question, which was in public use, the defendants claiming no title to or interest therein. The court properly held that the action was not against the State, and affirmed a judgment in favor of the plaintiffs. But under this and other decisions, if the defendant Wesley had been named by the plaintiff as an officer, it would have been held in effect an action against the State, and the plaintiffs would, for that reason alone, as occurred in the *Cunningham* case, have been turned out of court.

There is, however, no uniformity even on this point in the decisions. In the first important case² involving this question, Chief Justice Marshall in the opinion of the court held,

1. 167 U. S. 204, 221-2.

2. *Osborn v. U. S. Bank*, 9 Wheaton, 738-9, 846-58.

although the action was against State officers, as such officers, to restrain them from parting with money they had collected from a bank under a State tax law and to recover it back,—that the action was not against the State. The Chief Justice in reaching this conclusion laid down

“ as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently the eleventh amendment which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, *limited* to those suits in which *a State is a party on the record.*”²

Nearly half a century afterward this principle was reaffirmed in *Davis v. Gray*² in which the court again decided that “ where the State is concerned the State should be made a party. * * * In deciding who are parties to the suit, the court will not look beyond the record.” The court in that case also held that a suit against a State officer in his official capacity was not a suit against the State, although it related to State affairs, and he acted under a State statute, and the State was the real party in interest.

The old rule in equity required all parties in interest to be made parties to the suit. The result of the decisions above referred to, and especially in the *Osborne* and *Davis* cases, was an amelioration or adjustment of this rule to the novel situation created by the eleventh constitutional amendment, by permitting the case, where the State had or claimed an interest in the property in suit, to proceed against the actual parties in possession on behalf of or as representing the State. The *Cunningham* case, however, limited the application of this modified rule to cases where the actual parties were the

1. 9 Wheat. 857. The same rule had been asserted and explained in *Louisville R. Co. v. Letson*, 2 Howard, 551.

2. 16 Wallace, 203, 220.

officers of the State and were sued in their official capacity. But more recent decisions have qualified even that limitation, by holding that if State officers are sued as such officers, still the State is not a party unless the suit involves the validity or enforcement of a contract made in the name of the State, or the right to recover money in the State treasury, or the right to property in the exclusive or at least the actual control of the State; so that the State is the real party against which the relief is asked, and the judgment will effectively operate. In other words it is the final judicial conclusion of the effect of the eleventh amendment that in order to make a State a party to a suit, if not named, as such, it is necessary to determine, not merely by a reference to the nominal parties, but from the nature of the case as presented by the whole record, whether it is the real party in interest.¹ This method, however, of ascertaining whether a State is the real party to an action is rather a question of fact than a rule of law, or is at least a mixed question of law and fact, and renders it necessary in each case, to insure safety, to submit the record on appeal to the court of last resort.

The unconscionable outcome of this singular doctrine is the distinct judicial recognition and enforcement of the legal power of a State, after inducing investors to part with their money in the purchase of its obligations, issued in pursuance of express Constitutional and statutory authority, and as a party to the contracts pledging in the most explicit terms its credit and guaranty for the repayment of the loans, to repudiate at its leisure without redress to its creditors these deliberate and solemn engagements. In *Louisiana v. Jumel*,² this view was maintained by the court, Justices Field and

1. *Hagood v. Southern*, 117 U. S. 53; *In re Ayres*, 123 U. S. 53; *Missouri, etc., R. Co. v. Missouri Comrs.*, 183 U. S. 59; *Murray v. Wilson Dist. Co.*, 213 U. S. 151-2.

2. 107 U. S. 711, 712.

Harlan dissenting, and this unwise and irrational conceit received its approval as a tenet of our constitutional law. The undisputed facts in that case are correctly summarized in one of the dissenting opinions as follows:

“The State of Louisiana entered into certain engagements with her creditors; she embodied them in the most solemn form in a statute and in her organic law; she provided for the levying of a tax to pay those creditors; she prescribed certain duties for designated officers to perform in its collection and disbursement; she made it a felony for those officers to divert the fund thus raised to other purposes; she declared that no further legislation should be necessary for the collection of the tax or the appropriation of the proceeds, and that for the collection and payment of the tax the judicial power of the State should be exercised when necessary. The plaintiffs in these suits seek the enforcement of these engagements; and they are resisted merely because the engagements are repudiated by the State; and this court holds that it has no power to stay the repudiation.”¹

The court decided that the action could not be maintained, and the ground of the decision was that the State was the real party in interest and the State officers as the only parties defending the suit were merely obeying the orders of the supreme political power of the State; and that the court could not oust this political power by assuming control of the administration of the finances of the State. But the political power, as held by the court, had exhausted its energies, by making the contracts and embodying them in a statute and in the State Constitution, thus incurring the indebtedness; by levying a continual annual tax for the requisite amount and appropriating the revenue derived therefrom to the payment of the principal and interest of such indebtedness; and in providing

1. 107 U. S. 729.

“that no further authority should be required to enable the taxing officers to levy and collect the tax, or the disbursing officers to pay out the money as collected in discharge of the obligations—as the language thus employed shows unmistakeably a design to make these promises and these pledges so far contracts that their obligation would be protected by the Constitution of the United States against impairment.”¹

Moreover, the State Constitution assumed that the political power was exhausted, and provided in terms that “to secure such levy, collection and payment, the judicial power shall be exercised when necessary.”² If then the organic law of the Union is indeed the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding, as it solemnly declares, and if the deliberate acts of the State, as authorized by and embodied in its Constitution and laws and repeated in detail in its obligations to its creditors, were contracts within the meaning of the clause in the Federal Constitution, which declares that no State shall pass any law impairing the obligations of contracts, as held in the opinion of the court,—it necessarily follows that the subsequent efforts of the State to repudiate its contract liabilities, by further amending its fundamental and statutory laws, were to that extent absolutely futile and void. Nor is the criticism of the court upon the plaintiff’s prayers for relief of any force. It is elementary law that a court of equity will grant such relief as in its judgment the case requires, whether specially indicated or not in the pleading. It was accordingly the positive duty of the State officers to obey the mandates of the earlier Constitution of the State, which remained in force for the performance of these contracts, a positive and merely ministerial duty which the court has repeatedly held it will enforce against public of-

1. 107 U. S. 119-20.

2. 107 U. S. 714.

ficers.¹ The court, however, in this decision, not only acquiesced in the failure of justice in the particular cases brought before it, and in a palpable violation of the Constitution, but announced as a legal rule in this class of cases, that State officers could not be prosecuted for such official acts though illegal; and that the State was accordingly immune from the interdictions of the Federal organic law, and was at liberty to cheat and defraud the general public *ad libitum* without judicial restraint or interference. Upon the merits, this case presented substantially the same question as that involved in *White v. Hart* and *Osborn v. Nicholson*² where it was held that a contract, valid when it was made, prior to the Civil War, could not be rendered void and treated accordingly by a new Constitution or law of the State, or of the United States.

The decision of the *Jumel* case afforded a fine opportunity for the recognition and application of the interpretation of the constitutional extension of the judicial power, as maintained by Chief Justice Marshall in *Cohens v. Virginia*,³ that where the charge or allegation amounts to a plain violation of the Federal Constitution, not only the officer representing the State but the State itself may be prosecuted as a party to the action. In the language of the Chief Justice,

“the judicial department is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the Government of the Union and of a State in relation to each other; the nature of our Constitution; the subordination of the State governments to that Constitution;

1. *Board of Liquidation v. McComb*, 92 U. S. 531-2, 541; *In re Young*, 209 U. S. 125, 158, 162; *Zorfield v. Goldsby*, 211 U. S. 249; *Wolff v. New Orleans*, 103 U. S. 358.

2. 13 Wallace, 646-7; *Id.* 654.

3. 6 Wheat. 264-5.

the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department; are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. *We think a case arising under the Constitution or laws of the United States is cognisable in the courts of the Union, whoever may be the parties to that case.*"¹ "If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the second section of the third article which extends the judicial power to all cases arising under the Constitution and laws of the United States would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it, that this very important part of the clause was inserted. It may be true that the partiality of the State tribunals in ordinary controversies between the State and its citizens was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but that was not the sole nor the greatest object for which the department was created. A more important, a much more interesting object *was the preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority*; and therefore the jurisdiction of the courts of the Union was expressly extended to *all* cases arising under that Constitution and those laws. If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which expressly extends the judicial power of the Union to *all* cases arising under the Constitution and laws? After bestowing on this subject the most attentive consideration the court can perceive no reason founded on the character of the parties for introducing an exception which the Constitution has not made; and we think that the judicial power as originally given extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties."¹ "The

1. 6 Wheaton, 382-3.

Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. * * * If a State be a party the jurisdiction of this court is original; if the case arise under a Constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States.”¹ “It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. * * * All we can do is to exercise our best judgment and conscientiously to perform our duty. In doing this on the present occasion, we find this tribunal invested with appellate jurisdiction in all cases arising under the Constitution and laws of the United States. We find no exception in the grant and we cannot insert one.”²

This interpretation of the terms of the grant in the Constitution extending the judicial power to all cases arising under the Constitution as against any and all parties, including a State, at the suit of citizens of another State, received the unanimous approval of the court; and moreover this construction was in affirmance of another decision of the court to the same effect in *Martin v. Hunter*.³ Both of these decisions were thoroughly considered and were founded on the most elaborate reasoning; but they were disregarded without receiving even a passing notice in the *Jumel* case, and the judgment of the lower court, dismissing the action, was affirmed.

Moreover, the identical proposition involved in the *Jumel* case on the merits had been decided the other way in the earlier case of *Dodge v. Woolsey*.⁴ In that case the State of

1. 6 Wheat. 392-3.

2. 6 Wheat. 404.

3. 1 Wheat. 304, 334-5.

4. 18 Howard, 331.

Ohio chartered a bank in 1845, in which the amount of tax that the bank should pay in lieu of all taxes to which it would otherwise be subject was stipulated. In 1851 the State adopted a new Constitution authorizing taxes to be levied upon banks to a greater amount, and in 1852 the legislature passed an act increasing the taxes against the bank. The court held the latter act to be void under the Federal Constitution, and ruled that

“ a change of its Constitution cannot release the State from contracts made under a prior Constitution which permits them to be made. The inquiry is, is the contract permitted by the then existing Constitution? If so, and that cannot be denied in this case, the sovereignty which ratified it in 1802 was the same sovereignty which made the Constitution of 1851, neither having more power than the other to impair a contract made by the State legislature with individuals. The moral obligations never die. If broken by States and Nations, though the terms of reproach are not the same with which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less.”¹

Another creditor, who was a resident of the State of Louisiana, brought an action against that State in the Federal circuit court to enforce its liability upon certain bonds issued under the same authority and in the same manner as those involved in the *Jumel* case. This action also came before the Supreme Court upon a writ of error, from a judgment dismissing the suit on the ground that the State could not be sued without its consent.² This suit therefore was in like manner subject to the same general rule of jurisdiction as the *Jumel* case. But it was also subject to another rule announced by Chief Justice Marshall in *Cohens v. Virginia*, as follows:

“ If this writ of error be a suit in the sense of the eleventh

1. 18 Howard, 360.

2. *Hans v. Louisiana*, 134 U. S. 1.

amendment, it is not a suit commenced or prosecuted by a citizen of another State, or by a citizen or subject of any foreign State. It is not then within the amendment, but is governed entirely by the Constitution as originally framed, and we have seen that in its origin the judicial power was extended to all cases arising under the Constitution or laws of the United States without respect to parties.”¹

As the suit was brought against the State by one of its own citizens, the constitutional provisions as to parties had no relation to the case, and as it distinctly involved a violation of the constitutional prohibition of any law of a State “impairing the obligation of contracts,” it was “a case arising under the Constitution,” of which, according to Chief Justice Marshall, the court clearly had jurisdiction. The judgment, however, of the circuit court was affirmed.

This rule as enforced in the above cases of *Jumel* and *Hans* was laid down in earlier decisions; and was later extended to include all cases where affirmative relief was asked to enforce performance of contracts entered into by State officers on behalf of the State, upon which the State, after receiving the avails, subsequently repudiated its liability;² so that any State may, under these decisions, while retaining the benefit and appropriating the proceeds to its own use, repudiate the indebtedness and be exonerated from all liability incurred upon its contracts, excepting where the other contracting party is another State or the United States.

In the more recent cases, however, this doctrine has been modified, and the rule is now applied as follows: that if a State officer attempt to enforce a statute of the State in the name of the State, which is claimed to be in violation of the

1. 6 Wheat. 412.

2. *Hagood v. Southern*, 117 U. S. 53, 68-70; *Christian v. Atlantic, etc., R. Co.*, 133 U. S. 233, 243; *North Carolina v. Temple*, 134 U. S. 22, 30; *Smith v. Reeves*, 178 U. S. 436; *Murray v. Wilson Distilling Co.*, 213 U. S. 151.

Federal Constitution, and therefore void, he may be restrained by an action in the Federal courts, on the ground that the State is not then the real party in interest.¹ This was not a broad view of the subject. But the court was hampered by the prior decision of *Louisiana v. Jumel*. If this latter doctrine had been applied to that case, or if the true rule as stated by Chief Justice Marshall in *Cohens v. Virginia*, had been recognized and enforced, the odium of the decisions in the Louisiana cases would have been averted.

But the true answer to the conflicting decisions of the court upon this subject is, that neither the State nor the United States is concluded by any judgment in an action to which it is not a party, as such, in its own behalf. It is immaterial whether, in such an action, the public officer was a party as an officer or as an individual. The judgment in either event cannot operate as an estoppel against the State or the National Government. Not having submitted its rights to the determination of the court, the State or the United States may, despite the former judgment in such an action bring any suit in its own name that may be appropriate to establish or protect its corporate interests.²

Considering the general course of adjudication on this subject, it is, perhaps, not surprising that the court has by repeated decisions also adopted the rule that the United States cannot be sued or prosecuted without its consent. This rule has been strictly enforced notwithstanding the provision in the Constitution that "the judicial power shall extend * * * to controversies to which the United States shall be a party."

1. *Ex parte Young*, 209 U. S. 124, 159-60; *Western Union Tel. Co. v. Andrews*, 216 U. S. 165-6; *Herndon v. Rock Island R. Co.*, 218 U. S. 135, 155.

2. *Carr v. U. S.*, 98 U. S. 433; *Tindall v. Wesley*, 167 U. S. 205, 223; *Hussey v. U. S.*, 222 U. S. 93.

The question has frequently arisen, but no disposition was shown by the court to look into and examine the reason of the rule; and the point was summarily disposed of by the simple statement that the United States could not be sued without its consent. It first received a passing or desultory notice in the case of *Hill v. U. S.*¹ when Mr. Justice Daniel said:

“No maxim is thought to be better established or more universally assented to, than that which ordains that a sovereign, or a government representing the sovereign, cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends.”

In that case, however, the cause of action arose, not *ex delicto*, but upon the contract. In the later case of *The Siren*,² Mr. Justice Field referred to the rule as follows:

“It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. * * * The doctrine of the common law is equally applicable to the supreme authority of the Nation, the United States. * * * The same exemption from judicial process extends to the property of the United States, and for the same reasons.”

The result of these decisions is that the Federal Government is allowed to perpetrate the most abominable wrongs

1. 9 Howard, 386, 389.

2. 7 Wallace, 153-4.

upon private parties without legal reparation or redress. Of this injustice an example is afforded in the case of *Langford v. U. S.*,¹ in which it appeared that Indian agents of the United States took forcible possession of lands of private owners upon which such owners had erected valuable buildings, and with the aid of military force devoted them to permanent governmental use, refusing to make any compensation for the property. It was held by the court that no action would lie against the United States for the value of the property. Another case of palpable injustice is shown in the case of *Little v. Barreme*.² A Danish vessel, having on board neutral property, on a voyage from a French port to a Danish port, was captured by a frigate of the United States, upon "suspicion of violating the act of non-intercourse with France." The prize was taken to Boston and a libel filed against it in the district court. The statute only authorized such a capture while a vessel was sailing *to*, not from, a French port. The executive, through the Secretary of the Navy, issued instructions to the captain of the frigate, then cruising in the West Indian seas, not to allow the vessels or cargoes "bound *to or from* French ports" to escape him, and the captain acted pursuant to instructions. The Supreme Court held, affirming the circuit and reversing the district court, that the captain was liable for the damages because the instructions of the executive department were not warranted by the act of Congress. Chief Justice Marshall was at first inclined to think "that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against that Government from which the orders proceeded, and would be a proper subject for negotiation." But he receded from that opinion and concurred with his as-

1. 101 U. S. 341.

2. 2 Cranch, 170.

sociates that the captain was personally liable, and judgment was rendered accordingly. Thus the principal was released and the innocent subordinate held accountable.

The exemption of the United States as a party to an action or suit in equity from an adverse judgment, has even been extended to cases it has itself commenced as plaintiff, seeking relief against an individual. In such a case, if it be shown on the trial that the Nation instead of being a creditor is in fact a debtor, no judgment can be rendered against it,¹ not even for costs.² It is difficult if not impossible on legal principles to account for these decisions. Assuming that the United States or a State cannot be brought by an individual into court without its consent, its own act in commencing the action is certainly a consent to the suit, as well as a waiver of any right it may have to being sued by the defendant; and it is a voluntary submission to the jurisdiction of the court and the resulting application of the ordinary rules of law to the determination of the issues between the parties concerning the alleged indebtedness; and it should be compelled to abide the result of the litigation.

The first attempt since the adoption of the eleventh constitutional amendment to grapple with the question on principle is contained in the opinion of Mr. Justice Miller in the case of *U. S. v. Lee*.³ He said in part:

“It is necessary to ascertain, if we can, on what principle the exemption of the United States from a suit by one of its citizens is founded, and what limitations surround the exemption. In this, as in most other cases of like character, it will be found that the doctrine is derived from the laws and practices of our English ancestors; and while it is beyond question that from the time of Edward the First until now, the King of England was not suable

1. *U. S. v. Eckford*, 6 Wall. 484; *Schaumborg v. U. S.*, 103 U. S. 667.

2. *DeGroot v. U. S.*, 5 Wallace, 431.

3. 106 U. S. 204-9.

in the courts of that country, except where his consent had been given on petition of right, it is a matter of great uncertainty whether prior to that time he was not suable in his own courts in his kingly character as other persons were. * * * What were the reasons which forbid that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's Court. No such reason exists in our Government, as process runs in the name of the President, and may be served on the Attorney-General, as was done in *Chisholm v. Georgia*. Nor can it be said that the Government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment. * * * As no person in this Government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. * * * But little weight can be given to the decisions in the English courts on this branch of the subject for two reasons. (1) In all cases where the title to property came into controversy between the Crown and a subject, whether held in right of the person who was King or as a representative of the nation, the petition of right presented a judicial remedy—a remedy which this court, on full examination in a case which required it, held to be practical and efficient. There has been, therefore, no necessity for suing the officers or servants of the king who held possession of such property, when the issue could be made with the King himself as defendant. (2) Another reason of much greater weight is found in the vast difference in the essential character of the two Governments as regards the source and the depositaries of power. Notwithstanding the progress which has been made since the days of the Stuarts in stripping the Crown of its powers and prerogatives, it remains true to day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their Queen being turned out of her pleasure-garden by a writ of ejectment against the gardener. The Crown remains the fountain of honor,

and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the Government. * * * Under our system the *people*, who are there called *subjects*, are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right."

This reasonable and lucid exposition of the true rule of National and State suability applicable to a republican form of government has, however, been utterly ignored in all the subsequent cases. Judge Miller, endeavoring in the Lee case to account for the acceptance and approval of the archaic doctrine of non-suability, said:

"It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself in those courts."¹

The rule is therefore traced to the general doctrine of publicists, not to the Constitution. But this doctrine of publicists, as shown by the learned justice, is not applicable to the United States, which was created and is controlled by the provisions of the Constitution. The Supreme Court is not the mere agent of the General Government, but is itself a co-ordinate part of that Government, and in exercising the ju-

dicial power is indeed the supreme power in the Nation. It was not created by its co-ordinate branches in the government, but with them was authorized and ordained in the Constitution. It was organized by statute in compliance with the mandate contained in the Constitution creating and conferring upon it the judicial power. The only sovereign power in this country is "the People of the United States," who "in order to establish justice" among other things ordained and enacted the organic law. The Supreme Court as well as the executive and Congress, were accordingly created and legalized by the People, and were endowed respectively with all their powers in the Constitution.

The publicists, however, do not agree among themselves as to the reason or the extent of the rule exempting the sovereign from personal liability in the courts. Woolsey, in his work on Political Science,¹ referring to the Austrian Code, in which it is provided that "those legal proceedings which concern the supreme head of the State but relate to his private property, or to modes of acquiring property, which depend on municipal law, are to come before the judges and be decided according to the laws," adds as follows:

"This is clearly just. If the King or chief executive is the fountain of justice, or is in any way its support, why should he have an exemption from just law, except so far as to give him personal freedom for the sake of attending to his important duties? * * * Why should the highest representative of a just State be exempt from the control of just law?"

The same author expresses grave doubts concerning the propriety of the personal exemption of the sovereign in all cases from the criminal law. After considering the question at some length he concludes in these words:

1. 1st Vol., pp. 582-4.

"On the whole the principle of a king's unlimited irresponsibility ought itself to be limited, in order that the quiet and morality of the country and the safety and freedom from temptation of the sovereign, may be in a degree secured."¹

On the other hand another devotee of "political science" does not hesitate to lay it down as a postulate that "the king or queen regnant (of England) cannot be called to account for anything by any magistracy or any body," and adds:

"This absolute inviolability of the king and his exemption from accountability are not easily comprehended by the democratic mind. The democratic sense is continually forcing the question: 'But if the king should murder or steal, is it reason that he shall not be brought to justice?' * * * As I have said, the inviolability of the royal person is simply an immunity, an exemption of the royal person from governmental jurisdiction."²

This author then applies the same rule of immunity to the President of the United States:

"He is privileged from the jurisdiction of any court, magistrate or body over his person. * * * All States have found it necessary to recognize the complete personal independence of the executive head of the government, and some of them have founded it upon the doctrine that 'the king can do no wrong.' But there is another and deeper principle than that of the immaculate character of the king, upon which both the monarchic doctrine and the republican doctrine of the executive independence rest, viz., the necessary order of authority in every political organization."³

This author eludes criticism from a legal point of view by his statement that his doctrine of presidential inviolability

1. 1 Woolsey's Political Science, 584-5.

2. 2 Burgess' Political Science and Constitutional Law, 192-3.

3. Id. 245-6.

“is simply a postulate of political science,” and is “not expressly prescribed by the Constitution, nor provided by statute, nor contained in any decision of the court upon the case in point.”¹ He then gives the following reasons for his conclusions: The executive head of the government of the United States cannot be subjected to legal process without destroying the unity of the executive, in whom the whole executive power is vested by the Constitution. It would be impossible to execute any process upon the President should he resist it. Moreover, the President is vested with the power of pardon and could pardon himself.

It may not be amiss to consider in a few words these reasons for an absolute exemption of the President from personal obedience to the laws which it is his constitutional duty to execute and enforce. In the first place this exposition of presidential privileges is exceedingly vague and indefinite. Does it include civil as well as criminal process? The general preliminary proposition is broad enough to cover both, but all the reasoning relates to prosecutions for criminal offences. Again, the only authority cited is the case of *Mississippi v. Johnson*,² which was a decision denying an application for leave to commence a civil action to enjoin the President, as the executive power in the Government, from the exercise of his official discretion concerning his duty to execute an act of Congress. It was held that neither the executive nor legislature could be restrained, either in executive or legislative action, though the acts of both when performed were subject to judicial cognizance. The decision in the cases of *Mississippi v. Johnson*³ and *Georgia v. Stanton*,⁴ in both of which Mr. Justice Miller concurred, may, perhaps, be at-

1. 2 Burgess' Political Science and Constitutional Law, 245.

2. 4 Wallace, 475.

3. 4 Wallace, 475.

4. 6 Wallace, 50.

tributed to the policy explained by him in delivering the opinion of the court in a more recent case, as having been recognized or at least followed by the court, in refusing to interfere with proceedings of the civil or military agents of the Government under the reconstruction acts, as such interference was calculated, if not designed, "to cripple the exercise of the authority necessary to put down the rebellion."¹

So far as exemption from prosecutions for crime are concerned there is no room for discussion as it is expressly provided in the Constitution that the President shall be removed from office upon impeachment for and conviction of treason, bribery or other high crimes and misdemeanors. This affirmative provision excludes all other methods of criminal prosecution during his term of office. Nor is there any serious question concerning civil actions against him founded upon claims against the General Government, as such actions were usually if not necessarily brought against the corporate body of the United States. It then remains to consider merely personal claims against him resulting from his private acts as an individual.

The preliminary statement of this publicist is not correct that the whole executive power is vested in the President. He is limited in many particulars in the exercise of the executive power. He cannot make a treaty with a foreign nation, nor appoint an ambassador or public minister or consul, or a judge of any court, or a cabinet officer, or any other superior officer, except "by and with the advice and consent of the Senate." He must take an oath to "preserve, protect and defend the Constitution," and he is required to execute, as such, all the laws of the United States. He cannot nominate or appoint any senator or representative to any civil office which has been created, or the emoluments thereof increased,

1. U. S. v. Lee, 106 U. S. 222.

during the appointee's term of office. He cannot exercise the power of veto of any bill or concurrent resolution passed by the Congress, except under the restrictions contained in the Constitution. He cannot draw or authorize to be drawn any money from the treasury for any purpose until it has been properly appropriated by the Congress. He cannot violate any Constitutional law regulating the exercise of the executive power. There is, therefore, under the Constitution no unity of the executive power.

The service of civil process on the President, such as a summons, subpoena or execution and levy on his private property would not interfere with the performance of his duties, or embarrass him officially in the slightest degree. Even if the President were an attorney at law, he would not be required as a defendant to appear and defend himself in person, but like a layman could employ counsel to look after his interests in the courts; and he would be accommodated as a witness to suit his reasonable convenience. It follows that such a liability of the President would not contravene "the necessary order of authority" or "disorganize the government." The suggestion that the President might resist the service of process is an imputation upon his good faith as a citizen and his loyalty to the government of which he forms only a co-ordinate part; and would, if acted upon, subject him to impeachment and conviction of "a high crime and misdemeanor," and to his removal from office. The same suggestion could with equal inappropriateness be made that the President might persist in executing as valid an act of Congress which had been held by the Supreme Court to be unconstitutional and void. It is not a suggestion of "natural reason and necessity" but of revolution and anarchy. The further and final suggestion that the President could escape punishment by pardoning himself, is a novelty even in "political science," and need not be considered.

But the rule of non-suability at law or in equity has latterly been emphasized by the court and even formally extended to include the President and cabinet officers¹ as well as the collective body of the United States. It has also been held that the United States can maintain an action against a State in the absence of any provision of the Constitution to that effect,² the controversies therein mentioned being limited to those "between two or more States" and "between a State and citizens of another State," and "foreign States, citizens or subjects." Mr. Justice Harlan, after reviewing in the opinion of the court in *U. S. v. Texas* the decisions relating to the limitations of the Constitution as to the suability of States, continued as follows: "The question as to the suability of one government by another government rests upon wholly different grounds" than the suit of an individual against a sovereign without its consent.

"Texas is not called to the bar of this court at the suit of an individual, but at the suit of the government established for the common and equal benefit of the people of all the States. The submission to judicial solution of controversies arising between these two governments, 'each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other,' but both subject to the supreme law of the land, does no violence to the inherent nature of sovereignty."³

The inevitable inference from the foregoing opinion, as well as from the constitutional relation of the State Governments to the Government of the United States is the suability of the United States by any State of the Union. If the fact of its sovereignty involves the right of the United States to sue

1. *Georgia v. Stanton*, 6 Wallace, 50.

2. *U. S. v. Texas*, 143 U. S. 621; *U. S. v. Michigan*, 190 U. S. 396.

3. 143 U. S. 646.

a State, it must necessarily include the same right of a State to sue the United States. As explained by Chief Justice Marshall, in *McCullough v. Maryland*,¹ "In America the powers of sovereignty are divided between the Government of the Union and those of the States. They are "each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other." But the court has nevertheless distinctly decided that a State cannot maintain an action against the United States, summarily disposing of the question as follows:

"It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion."²

The passing remark that public policy prohibits a suit by a State against the United States, while it allows the latter to sue the former, throws no light upon the subject. It is a mere arbitrary distinction between the National and a State sovereignty, in the application of the rule that a sovereignty may not be sued in the courts without its consent. A public policy, to be recognized and enforced by the court, must be founded upon and be consistent with the Constitution and the laws, and clearly accordant to the basic principles and powers of the Government. Assuming then that the rule is applicable to the United States, and that the Union and the States are each sovereign in their own spheres, it is absurd to hold that the rule is not reciprocal or equally applicable to all the sovereignties, State and National, in their constitutional relations to each other.

Another reason for the rule has recently been promulgated

1. Wheaton, 410.

2. *Kansas v. U. S.*, 204 U. S. 331, 342.

by the court. This new appeal to logic as expressed in the opinion of Mr. Justice Holmes,¹ is, that

“a sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. * * * As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally is extended to those that in actual administration originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked.”

And the doctrine of exemption from suit was accordingly extended to an organized Territory of the United States. The reasoning of Judge Holmes would also exempt a city or village, acting under the usual grant of power to such municipalities to legislate concerning their local affairs, from all legal liability for corporate acts within the limitations of their municipal jurisdiction. Grappling, however, with the applied logic of this opinion in its broadest scene, it is apposite to ask, is not the President of the United States, or the Governor of a State, subject to the law which it is his official duty to recognize and enforce? Are not the Constitution and laws obligatory upon every officer of the Government, from the highest to the lowest? Are not the President and Congress in making laws subject to the Constitution, and are not the laws binding on the law-makers and all others in authority? Is not “the authority that makes the law” in our system of government limited by and amenable to the law? Is this not a government of laws, and not of men? Stripped of its formal appeal to logic this new method of stating the

1. *Kawananokoa v. Polyblank*, 205 U. S. 353.

principle is neither more nor less than the old doctrine in a new dress that the Government is immaculate and therefore above the law. As stated by Mr. Justice Miller in *United States v. Lee*,

“No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.”¹

But upon any principle applicable to our republican form of government, this special claim of exemption of a sovereignty, State or National, from the suit of a citizen, ought not to be recognized as having any validity or force. The origin of the rule is clearly traceable to the feudal law. Under the feudal system the commonalty were mere tenants or serfs, holding directly from the lord of the manor, and either directly or indirectly from the King. Even the lords as tenants in chief of their royal master, as well as their sub-tenants or villeins, held their property subject to the condition of rendering special service to the sovereign at his behest. The more important features of feudalism were, after the Norman Conquest, transplanted into England; and the conqueror and his successors, accordingly became the owners in fee of nearly all the land in the kingdom. No change of tenancy could be made without the royal consent. Many other privileges, which operated oppressively upon the tenants, enured to the lord and to the King as incidents of this singular tenure. Among the royal immunities was the exemption of the sovereign from suit, without his consent, by any of his subjects.

1. 106 U. S. 220.

On the other hand, the weight of authority is clear to the effect that prior to the conquest the Anglo-Saxon Kings as well as private persons, were suable in the courts, and were amenable to the laws of the kingdom.¹ This is now also indirectly the rule for all practical purposes in England. The ancient power of royalty on this and other more vital questions, as that of vetoing acts of parliament, has waned so materially since the revolution of 1688, that while the form of royal signature to such acts is still required, the real power of veto has vanished. Likewise the King or Queen in person may not be sued, except by the petition of right; to which, however, a formal assent is given as a matter of course. The royal assent in both cases is still essential, but if the petition state a *prima facie* case, it never is and may not be refused.

“ This plaintiff, indeed (in the latter case), will be told that he receives justice from the King as a matter of grace and not on compulsion, and he must pray for it and accept it on these terms. But while the favor he receives is one that cannot be withheld from him, it is to all essential purposes a right; and the mode of obtaining it can be considered as nothing more than an unmeaning complement to the legal fiction it disregards and eludes.”²

Even in countries of such extreme political conservatism as Prussia and Spain “ the King could be sued by any of his subjects in his courts of law. * * * Nor was this an antiquated or empty privilege,” but was “ frequently exercised.”³ In Prussia, however, the King may only be sued as a person, not in his official capacity.

“ The Prussian Code regards the Kingly dignity as an office

1. Allen on the Royal Prerogative, 95-97.
2. Allen on the Royal Prerogative, 94.
3. Allen on the Royal Prerogative, 98-9.

merely, and not as a personal attribute, being the hereditary head functionary of the commonwealth. In his private capacity, accordingly, he may be sued civilly in the courts, as a matter of course.”¹

A recent litigation in the imperial courts of Germany between the Emperor William II and one of his subjects recognises this rule of law as still in force under the empire. The result was adverse to the emperor, concerning the title to certain land in dispute between them, when he gracefully yielded to the decision of the court and came to an amicable adjustment of the controversy with his antagonist.

The course of procedure in England is now regulated by an Act of Parliament, passed in the reign of Queen Victoria. Under this act the form of petition and of the royal consent that “right be done,” are carefully prescribed and then the ordinary practice is pursued in the courts at Westminster, including the allowance of costs to the successful party.² This mode of relief, equally given to natives and aliens, has been sustained and approved by our Supreme Court, under the Act of Congress authorizing aliens to prosecute claims against the United States in the Court of Claims, where the same right is accorded to our citizens by the courts of the country of such aliens, as affording an adequate and efficient legal remedy. Referring to the “petition of right,” the court said:

“The law allows the subject by petition to inform the King of the nature of his grievance, and ‘as the law presumes that to know of any injury and to redress it are inseparable in the royal breast,’ it then issues, as of course, in the King’s own name, his order to his judges to do justice to the party aggrieved.” “Evidently Congress meant to confer on the British subject the right to

1. Fischer’s English Constitution, 135, note.

2. 23 & 24 Vict. Ch. 34; Fischer’s English Constitution, 135-6.

sue in the Court of Claims under the act relating to captured and abandoned property, if in the ordinary course of administration of justice in England, the law secures to the American citizen the right to prosecute his claim against the government in its courts. That the petition of right accomplishes this object, cannot admit of question. If the mode of proceeding to enforce it be formal and ceremonious, it is nevertheless a practical and efficient remedy for the invasion by the sovereign power of individual rights.”¹

It thus appears that in England an adequate remedy is afforded to an individual in the ordinary courts against the Government upon all claims growing out of dealings with its agents or representatives concerning public affairs. In other words, the English law recognizes and enforces a legal liability for injuries to persons or their property resulting from governmental acts. It only exempts the King from liability for his personal torts. This exemption is founded on the theory that the King can do no wrong. But as the royal executive takes no part in the administrative details of the civil, municipal or political affairs of the government, this personal exemption is of no practical importance.

It is a most amazing judicial conclusion that under our system of government the President of the United States is immune from legal prosecution during his term of office, not only in his official capacity, but also as an individual; and this immunity is even extended to the members of his cabinet in many affairs of a public nature, where they act as representatives of the President or in his behalf.² This is a government of the people, through their representatives. The President and his subordinates, as well as the senators and members of the House of Representatives, and all the justices of the courts, are merely the official servants of the

1. *U. S. v. O'Keefe*, 11 Wallace, 178, 183-4.

2. *Oregon v. Hitchcock*, 202 U. S. 60, 61; *Naganab v. Hitchcock*, 202 U. S. 473.

people, and all of their official power is derived under the Constitution from the people. It would seem to follow as an inevitable inference that the President as well as all other officers, executive, legislative and judicial, who have been taken from the people and endowed with the honors of public service, should not thereby become exempt from any of the obligations of citizenship; nor is there any hint in the Constitution of such an exemption for any official, from the highest to the lowest. Their rights and duties as citizens are not merged in their official positions, or changed in any respect. There is no claim of immunity for any other official than the President and his cabinet appointments. Nor is there any reason for such a distinction in behalf even of the President, unless we are prepared to adopt the Roman custom of ascribing a divine afflatus to our rulers after their elevation to public office. The President, instead of becoming by his election a subject of supernatural inspiration, remains a plain American citizen, temporarily chosen a public officer and charged during his term with the execution and enforcement of the laws; and as the National executive it is especially incumbent upon him to lead the people in the line of their civic duties, by his own example of implicit obedience to the laws. Even an impeachment, upon which he may be convicted, only results in his removal from office. He is still amenable to prosecution and punishment as a criminal for any crimes he may have committed, including those which resulted in his deprivation of office.

The President, indeed, should be subject to all legal process during his official term, as the course of justice ought not to be obstructed or delayed by his refusal to obey the laws to which he is subject and of which he for the time being is the actual impersonation. Doubtless the President, acting within the constitutional limitations of his political power, is independent and supreme, and may exercise his official

discretion *ad libitum*. The courts may not intervene, whether his discretion is wisely or arbitrarily given effect. The true distinction is between the exercise of official discretion and official action in excess of the executive power. His political discretion ceases with the limitation of his power.

Chief Justice Marshall, presiding in the circuit court on the trial of Aaron Burr, took the only sensible view of the Constitution upon this question. He decided after the most elaborate arguments, his opinion displaying a masterly exposition of the subject, that President Jefferson could properly be subpoenaed to attend the trial as a witness and directed a subpoena *duces tecum* to be issued requiring him to produce a letter in his possession to be read in evidence, if found to be pertinent and competent for that purpose. The trial, however, came to a close on the failure of the prosecution to prove the essential *overt act* of treason, and it became unnecessary for the defendant to present his evidence in court; so that the further question did not arise of enforcing obedience to the subpoena. But it is evident from the opinion of the Chief Justice that it was the duty of the President to obey the mandate of the court. The President also seems to have reluctantly taken this view, as he sent the document to the district attorney to be produced when required by the court.¹

1. Since writing upon this topic my attention has been drawn to Goodnow on Administrative Law, 91, where it is stated that Chief Justice Marshall held in the trial of Burr "that the courts have no power to subpoena the President," citing as an authority 6 Amer. & Eng. Enc. of Law (2nd ed.), p. 1019. It is there stated in the text that "while a subpoena *duces tecum* was issued against President Jefferson, requiring him to appear with a certain letter, no process was allowed to compel attendance upon the President's refusal." But the subpoena was a legal process issued by the special order of the court, the only purpose being to compel his production of the letter. The President did not refuse to produce the letter, but sent it to the district attorney to produce in court when required, and he notified the court accordingly. The "report by Westcott & Co., Washington, 1807, and Hopkins & Earl's, Ed., Phila-

But the Supreme Court in the great case of *Chisholm v. Georgia*¹ thoroughly considered and determined this question in the light of general principles and the authorities, and reached the same conclusion. That case only involved the right to sue the State in its corporate capacity, and the eleventh amendment of the Constitution, declaring that the judicial power shall not be construed to extend to any suit against a State by citizens of another State, or by citizens of subjects of any foreign State, did not affect the question of the suability of the United States or of officers of the Nation or of any of the States. The reasoning of the judges in the opinions delivered in that case are therefore applicable to all cases commenced against the United States or any public officers. The consummate reasoning of Mr. Justice Wilson in his opinion covers the whole subject, and may be briefly summarized as follows:

First:—The States and likewise the United States were created by and are composed of the people. They are therefore the creatures, not the sovereigns, of the people. The State and the National Governments were organized and established pursuant to the authority conferred by their seve-

delphia, 1808," are cited as authority, and also for certain remarks of the chief justice, indicating that he thought he had no power to issue or enforce obedience to the subpoena. I am unable to verify these citations, but it goes without saying that the chief justice would not have stultified himself by granting an order he had reason to believe was not authorized by law. He repeatedly displayed by his rulings in that case the courage of his convictions. There is, however, another report of the trial, "taken in shorthand by David Robertson, counsellor at law," as republished by Cockcroft & Co., of New York, in 1875, in the volumes of "*Causes Celebres*," which is a direct authority to the contrary. According to that report over 72 pages are taken up with the argument of the motion and 11 pages with the opinion of the chief justice, in which he carefully considered all the objections of counsel for the Government, and reached the deliberate conclusion that the process should issue, and granted an order to that effect. I therefore retain my original text, without alteration.

1. 2 Dallas, 419.

ral constitutions as adopted by the people, and are subordinate to the political entities of the States respectively and of the Nation, as well as subservient to the people. These artificial entities are "bodies of free persons united together for their common benefit, to enjoy peaceably what is their own and to do justice to others." Is there any reason leading to the conclusion that a State or a Nation "any more than the men who compose it, ought not to do justice and fulfill engagements?" "If justice is not done, if engagements are not fulfilled, is it less proper in the case of a great number than in the case of an individual to secure by compulsion that which will not be voluntarily performed? Shall the greater number composing the State or the Nation, when summoned to answer the demands of its creditor, be permitted to insult him and justice by declaring I am a sovereign State" or Nation? "In one sense the term sovereign has for its correlative, subject." But there are no subjects under our Constitution. The term is only used in that instrument in connection with "foreign States or subjects," while our own people are referred to as "citizens of the United States" and "citizens of the different States."¹ Again, the Government of Georgia is republican, and "the short definition of such a government is one in which the supreme power resides in the body of the people." In another sense "sovereignty is derived from a feudal service; and like many other parts of that system, so degrading to man, still retains its influence over our sentiments and conduct, though the course by which that influence was produced never extended to the American States." There is, however, another principle which "forms the basis of sound and genuine jurisprudence. Laws derived from the pure source of equality and justice must be founded on the consent of those whose

1. Art. 3, sec. 2, sub. I.

obedience they require. The sovereign when traced to this source must be found in the man."

Second:—Examining the practice of modern times in European countries concerning the suability of sovereigns, he referred particularly to Spain and Prussia as well as England, and cited the interesting case of Don Diego, the son of Columbus, against the King of Spain. That claim was founded upon and prosecuted to enforce performance of a contract relating to the project of discovering a western world, which the King subsequently refused to fulfill, and the decision of the council sustained the claim of Don Diego. Frederick the Great did not hesitate to recognize his liability upon any legal claim of the humblest of his subjects, as appears from the following quotation from his works: "Judges ought to know that the poorest peasant is a man as well as the King himself; all men ought to obtain justice, since in the estimation of justice all men are equal, whether the prince complain of the peasant or the peasant complain of the Prince." And as to England the learned judge said in conclusion: "True it is that now the King must be sued in his courts by petition; but even now the difference is only in the form, not in the thing."

Third: The people of the United States, including the people of Georgia, ordained the Constitution to establish justice as one of its principal objects and vested the judicial power in the courts; and the exercise of this power extends over all the States. The main purpose indeed of forming the Constitution was to cure the defects of the old articles of confederation, which recognized no executive power and allowed the exercise of no judicial authority except before a legislative committee in admiralty and maritime cases, and gave Congress no authority to enforce its requisitions upon the States of men or means for the protection of the Union. But under the Constitution

“nothing could be more natural than to intend that the legislative power should be enforced by powers executive and judicial.” “When the laws are plain and the application of them is uncontroverted, they are enforced immediately by the executive authority of Government. When the application of them is doubtful or intricate, the interposition of the judicial authority becomes necessary.” “Whoever considers in a combined and comprehensive view the general texture of the Constitution will be satisfied that the people of the United States intended to form themselves into a Nation for National purposes. They instituted for such purposes a National Government, complete in all its parts, with powers legislative, executive and judiciary; and in all those powers extending over the whole Nation. Is it congruous that, with regard to such purposes, any man or body of men, any person natural or artificial, should be permitted to claim successfully an entire exemption from the jurisdiction of the National Government?” The language of the Constitution is conclusive: “The judicial power of the United States shall extend to controversies between a State and citizens of another State.”

Chief Justice Jay also delivered a very able and unanswerable opinion in the case, in which he came to the same conclusion. He clearly defined the nature and extent of the sovereignties of the States and of the Nation. The people of the United States, who ordained the Constitution, are for the general purposes therein stated “the sovereigns of the whole country.”

“The sovereignty of the Nation is in the People of the Nation and the residuary sovereignty of each State is in the people of the State. * * * The sovereignties in Europe and particularly in England exist on Feudal principles. That system considers the prince as the sovereign and the people as his subjects; it regards his person as the object of allegiance, and excludes the idea of his being on an equal footing with a subject, either in a court of justice or elsewhere. * * * No such ideas obtain here; at the revolution the sovereignty devolved on the people; * * * but they are sovereigns without subjects, and have none to govern

but themselves; the citizens of America are equal as fellow citizens and as joint tenants in the sovereignty.”¹

Second:—Is suability compatible with State sovereignty?

“If there be any such incompatibility whence does it arise? In what does it consist? There is at least one strong undeniable fact against this incompatibility, and that is this; any one State in the Union may sue another State in this court, that is all the people of one State may sue all the people of another State. It is plain then that a State may be sued, and hence it plainly follows that suability and State sovereignty are not incompatible. * * * It is not therefore to an appearance in this court that the objection points. * * * It points to an appearance at the suit of one or more citizens.”

The process and the consequences of a judgment are the same in the latter case as when the suit is brought by all the people of another State. The only difference can arise from the feelings of those who may regard a suit by citizens, as such, in an inferior light.

“But if any reliance be made on this inferiority as an objection, at least one-half of its force is done away by this fact, viz., that it is conceded that a State may appear in this court, as plaintiff against a single citizen as defendant; and the truth is that the State of Georgia is at this moment prosecuting an action in this court against two citizens of South Carolina.”

The State of Georgia by becoming a party to the compact of the Union and the Constitution consented to be suable by a citizen of another State.

“The extension of the judicial power is remedial because it is to settle controversies. It is therefore to be construed liberally. It is politic, wise and good that not only the controversies in which a State is plaintiff, but also those in which a State is defendant,

should be settled; both cases therefore are within the reason of the remedy, and ought to be so adjudged unless the obvious, plain and literal sense of the words forbid it. * * * It cannot be pretended that where citizens urge and insist upon demands against a State, which the State refuses to admit and comply with, there is no controversy between them. If it is a controversy then it clearly falls not only within the spirit but the very words of the Constitution. * * * The exception contended for would contradict and do violence to the great and leading principles of a free and equal National Government, one of the great objects of which is to ensure justice to all; to the few against the many, as well as to the many against the few. * * * Words are to be understood in their ordinary and common acceptation, and the word party being in common usage applicable both to plaintiff and defendant, we cannot limit it to one of them in the present case."

The Chief Justice declined, however, to commit himself in his opinion to the application of the same rule to a suit by a citizen against the United States, leaving that a question to be determined when it should arise in the future; merely suggesting the following difference between the two cases: "In all cases of action against States or individual citizens, the National courts are supported in all their legal and constitutional proceedings and judgments by the arm of the executive power of the United States; but in cases of actions against the United States, there is no power which the courts can call to their aid." This incidental suggestion was evidently made without serious reflection, and was a palpable misapprehension of the duty imposed upon the executive power by the Constitution. A decision of the court of dernier resort is the final determination of a suit at law or in equity, and accordingly becomes *instantly* the law of the land, binding on the executive. It is immaterial whether the parties defendant are citizens of States or the United States, if the court decides that they are real parties to the controversy and proper parties to the action. There is a single instance

in our National history when the executive refused to execute, or to permit, a decree of the Supreme Court to be carried into effect. But that was a suit against the State of Georgia,¹ which was decided over eighty years ago. The action of President Jackson in that case, however, would hardly be regarded as a precedent to be followed.

The Chief Justice closed his opinion with the remark that he was "not prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State at a time when no ideas or expectation of judicial interposition were entertained or contemplated." This singular suggestion recalls the special circumstances existing during the first decade of our Constitutional Union, which rendered the doctrine of the non-suability of States exceedingly popular, and resulted in the immediate adoption of the eleventh amendment to the Constitution.

All or nearly all of the States had contracted debts before the formation of the Union, and issued obligations to their creditors, most of which at the close of the war for independence were held in the mother country. Article Four in the Treaty of 1783 accordingly provided "that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." These creditors were pressing payment of their claims under the treaty of peace. By this constitutional amendment "citizens or subjects of any foreign state" were precluded from enforcing collection of their claims for indebtedness against any of the States. This amendment therefore resulted in the practical repudiation of all such foreign debts. It is true that there were other provisions of the treaty in favor of the United States which were not

1. *Anté*, p. 281; *Worcester v. Georgia*, 6 Peters, 515.

performed by Great Britain, at least for many years. But this method of permanent repudiation of State indebtedness can only be regarded with complacency by those who are willing to maintain the perfect propriety of all the acts of their own country in dealing with foreign lands, whether they are right or wrong.

CHAPTER VI.

JURISDICTION CONTINUED.

The judicial power extends to and includes all questions in litigation involving executive or legislative acts under the Constitutional provision guaranteeing to the several States a republican form of government.

A literal interpretation of this constitutional provision read in connection with the grants of the legislative, executive and judicial powers, supports and sanctions the general doctrine that a political question is not to be entertained judicially unless it involves a violation of the Federal Constitution. Like a legislative act it is ordinarily within the exclusive cognizance and control of the executive and Congress. But when there arises a distinct issue of its constitutionality, it clearly comes within the range of the extension of the judicial power. It is true, however, that a distinction has been suggested and occasionally repeated in the opinions of the court that this constitutional provision is not within the exception to the rule making action under it, if in violation of the provision, subject to the judicial power; so that in this view the enforcement of the constitutional guaranty can never be brought within the jurisdiction of the court. But no well grounded decision has been rendered to that effect.

The leading case in which this suggestion was made is *Luther v. Borden*.¹ In that case there was no federal question before the court, and the suggestion was a judicial

1. 7 Howard, 1.

dictum.¹ There were at the time two nominal state governments in Rhode Island struggling for the mastery, each claiming to be legitimate. Both were republican in form. The courts of that State had decided that the charter government under which the State had been established for more than half a century was the only real existing Government of the State. The Federal courts were concluded by that decision. Chief Justice Taney, who delivered the opinion of the court, disposed of the case as follows:

“The point raised here has been already decided by the courts of Rhode Island. The question relates altogether to the Constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State. Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest.”²

The same rule was reiterated and applied in many subsequent cases, of which a few are cited.³ And yet in all these

1. An opinion expressed by a court, but which not being necessarily involved in the case, lacks the force of an adjudication. Rawle's *Bouvier's Law Dictionary*, 567, *dictum*.

2. 7 Howard, 40.

3. In *re Duncan*, 139 U. S. 449, 456; *Wilson v. North Carolina*, 169 U. S. 556; 592-3; *Taylor v. Beckham*, 178 U. S. 548, 574, 578.

cases the court, after holding that the decisions of the State courts were conclusive, allowed the judges writing the opinions to indulge in further observations, not necessary to and therefore not a part of its decisions, concerning the exclusive political nature of the constitutional guaranty to the several states of a republican form of government. That the political departments are authorized by this provision to intervene in a proper case of a local or state controversy is not questioned. But it is insisted that such an intervention does not preclude the court in an action between proper parties from the exercise of the judicial power to ascertain whether the guaranty was properly applied and enforced in pursuance of the Constitution. Neither the executive nor Congress, however, had intervened, nor attempted to intervene, in any of the State controversies, including especially those in Rhode Island and Kentucky, to which more particular reference is made later; so that no question could or did arise in those cases concerning the extent of the political power of the executive or of Congress to enforce the guaranty of a republican form of government.

But the court, in 1911, distinctly decided that the enforcement of this constitutional provision is not only of a political character but is exclusively committed to Congress, whose decision cannot be questioned by the judiciary.¹ This latest decision of the court was founded upon the *dictum* of Chief Justice Taney, in *Luther v. Borden*, as "absolutely controlling." Chief Justice White, who delivered the opinion of the court, seems to have regarded the *obiter dicta* of three of his predecessors in the cases above referred to, as so conclusively establishing the rule as to preclude further discussion and "to cause the matter to be absolutely foreclosed." He therefore contented himself with repeating the suggestions of

1. *Pacific Telephone Co. v. Oregon*, 223 U. S. 118; *Id.* 147-9.

Chief Justice Taney in *Luther v. Borden*, and of Chief Justice Fuller in *Taylor v. Beckham*. As it is stated in the opinion of the present Chief Justice that in the latter case the question "was necessary to be decided," it may be well to add the following statement of Chief Justice Fuller:

"The commonwealth of Kentucky is in full possession of its faculties as a member of the Union, and *no exigency has arisen* requiring the interference of the general government *to enforce the guaranties of the Constitution*, or to repel invasion, or to put down domestic violence."¹

Returning to the dictum of Chief Justice Taney, which is cited by the present Chief Justice in the Oregon case as the controlling authority, we are informed that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority." It would have been more pertinent and effective if he had referred to the act of Congress admitting the State into the Union. Doubtless that act would have been a decisive authority as to the republican form of government of the State at the time of its admission. Such an act is final and cannot be reconsidered or recalled. The State cannot withdraw or secede, nor can it be expelled from the Union. As the court has decided in recent cases, the United States is "an indestructible Union of indestructible States."²

Can, then, the States be denied representation in either house of Congress while they are loyal to the Union for any cause or reason founded upon the action of the States in changing their own original government from the republican

1. 178 U. S. 580.

2. *Texas v. White*, 7 Wallace, 700, 725; *White v. Hart*, 13 Wallace, 646, 650.

to some other form? There is no such authority given in the Constitution. Every State, as such, is clearly entitled to representation in the Congress of the Nation, if its representatives are competent and loyal persons properly chosen or elected. They must possess the requisite qualifications of age, citizenship and residence in the State. The House of Representatives is not a legal body unless it is "composed of members chosen every second year by the people of the several States;" and "the Senate of the United States shall be composed of two senators for each State chosen by the legislature thereof for six years."¹ It is true that "each House shall be the judge of the elections, returns and qualifications of its own members," but not of the republican form of government of the States they are chosen to represent. In that respect the two Houses are concluded by their joint act in admitting the State as a member of the Union. Each House may also punish its members for disorderly behavior, and with the concurrence of two-thirds may expel a member. In other words the provisions are specific as to the nature and extent of the power conferred upon the two Houses over their members, and there is no hint or suggestion and no implication that either House may reject representatives of a State for any other cause. The State then is a persistent, permanent, perpetual, interminable member of the Union; and if any question arises after its admission as to the proper conservation of its republican form of government, that question, while it may primarily come before the legislature, is essentially of a judicial nature and can only be finally determined by the courts. Indeed the interpretation to be given to the phrase "republican form of government" is obviously a judicial question, and can only be eventually ascertained and settled by the exercise of the judicial power.

1. Art. 1, sec. 2, sub. 1, and sec. 3, sub. 1.

The Supreme Court in passing upon the peculiar dispensary system of South Carolina¹ evidently so regarded it, and did not hesitate to assume that a State, by taking exclusive possession and control within its borders of the manufacture and disposition or distribution of certain important commodities or of the mastery and management of great public utilities, might be judicially regarded as having changed in that respect its governmental sphere as a representative republic for the more remunerative profits of an arbitrary and autocratic monopoly in commercial speculation.

Moreover, the propriety and indispensability of a judicial review of governmental action under this provision of the Constitution is abundantly disclosed and clearly developed in the course pursued by Congress in the southern States during the Civil War. Assuming to exercise the power thus conferred in the adoption of the reconstruction acts, Congress, instead of guaranteeing or attempting to guarantee a republican form of government, practically abolished and prohibited it in those States, and subjected all the territory to the rigid and unrelenting rule of military domination. While this was done at first and might have been continued during resistance of the insurgents in the proper exercise of the war power, the reconstruction legislation in authorizing the arbitrary and oppressive methods of military rule under the sanction of the civil law, and enforcing them in civil life, was a palpable violation of the Constitution. It accordingly remains as a precedent, the court having refused to entertain an action to test its validity, either against the President or even the Secretary of War or officers entrusted with the execution of the details of this quasi-military government.²

In *Boyd v. Thayer*³ the court exercised jurisdiction on ap-

1. 199 U. S. 437, 454-5.

2. *Mississippi v. Johnson*, 4 Wallace, 475; *Georgia v. Stanton*, 6 Wallace, 50.

3. 143 U. S. 135-6.

peal of a case involving the question whether the Governor of a State was a citizen and therefore eligible to hold the office to which he had been elected, although he was born abroad and had never been naturalized and notwithstanding there was no record of the naturalization of his father (who had emigrated to this country when the son was ten years of age, and had only declared his *intention* to become a citizen), thus maintaining the political right of the son under the Federal Constitution, to be recognized as a citizen, in view of the further fact that he had been treated as such by common consent for many years and been elected to and held other offices in the State without objection; and the court therefore reversed the judgment of the State court, which had held that the acting governor was ineligible and incompetent under the Constitution and the laws of the State to continue to hold the office to the end of the term. Why, then, cannot the court entertain jurisdiction of another case on appeal from a State court, in which it is averred that a body of persons or collection of people unknown to the law and in violation of the Constitution, has undertaken without any proper authority to levy and collect on behalf of the State a tax upon individuals or corporations?

In the Boyd case it was claimed and held by the court that a citizen, in violation of the acts of Congress, passed to establish a uniform rule of naturalization, as authorized by the Constitution, had been deprived of a personal right, to wit, the office of Governor of a State, on the theory that he was not a citizen. Why, then, may not the court entertain, consider and determine the claim of a corporation that it had been deprived of its property by taxation through the action of an unlawful assemblage of the people, assuming to act as a legislative body, in violation of the Constitutional provision guaranteeing to the State a republican form of government? In the Boyd case it was alleged and held that the

wrongful act was in violation of a statute, and in the Oregon case it was alleged to be an infraction of the Constitution; and both cases were therefore equally and clearly within the terms of the extension and accordingly subject to the exercise of the judicial power, as "cases in law or equity arising under the Constitution or laws of the United States."

The Chief Justice in the Oregon case deemed it politic and prudent to forestall criticism by depicting at length all the conceivable difficulties and complications that might ensue in governmental affairs if the court should review and overrule the action of the political departments concerning a republican form of government. He asserted and maintained that the particular objections appearing in the case, as interposed in various forms to the amendments adopted by the State of Oregon, to its former constitution, "proceed alone upon the theory that the adoption of the initiative and referendum *destroyed* all government, republican in form in Oregon."¹ And he was accordingly astounded by a contention which "if held to be sound, would necessarily affect the validity, not only of the particular statute which is before us, but of *every other statute* passed in Oregon since the adoption of the initiative and referendum."²

An examination, however, of the record, so far as included in the report of the case, does not appear to warrant these conclusions. The Oregon Constitution, as amended, contained the usual provision that "the legislative authority of the State shall be vested in a legislative assembly, consisting of a Senate and House of Representatives." It then provided for exceptions to this general method of legislation, as follows:

"But the people reserve to themselves power to propose laws

1. 223 U. S. 138, 141.

2. 223 U. S. 141.

and amendments to the Constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly. * * * Referendum petitions shall be filed with the Secretary of State not more than ninety days after the final adjournment of the sessions of the legislative assembly which passed the bill on which the referendum is demanded. * * * This section shall not be construed to deprive any member of the legislative assembly of the right to introduce any measure.”¹

It is to be presumed in the absence of evidence to the contrary, that under these provisions legislation was ordinarily passed by the legislative assembly, and that only exceptionally and occasionally laws were submitted to the people for their adoption or approval. It would be absurd to suppose that all the laws of the State were adopted under the reserved power by the cumbrous methods of the initiative and referendum.

Proceeding, however, upon these unsubstantial inferences or conclusions, the Chief Justice was apparently appalled by the proposition he assumed was involved in the case that every citizen or person subject to taxation might be heard for the purpose of defeating such taxes “to assail in a court of justice the *rightful existence of the State*.” And he also assumed that as a result of the hearing such a litigant might impose upon the court the duty to examine as a justiciable issue the *illegal existence of the State*, and to “practically award a decree *absolving from all obligation to contribute to the support or to obey the laws of such established State Government*.” The Chief Justice added as a final conclusion that

“as a consequence of such judicial authority a power in the judi-

1. 223 U. S. 134-5.

ciary must be implied, unless anarchy is to ensue, to *build* by judicial action upon the *ruins* of the previously established government a *new* one—a right which by its very terms also implies the power to control the legislative department of the Government of the United States, in the recognition of such new government," etc.¹

How unreal and illusory these judicial generalizations are is apparent from the record. The State of Oregon was in existence with a constitution establishing a representative form of government long before the amendments of the initiative and referendum were adopted, and those provisions are still in force. The issues in the case therefore involved merely the validity of these amendments; and if the court had exercised its jurisdiction, and had reached the conclusion that such amendments were in contravention of the Federal Constitution it would merely have annulled the amendments, lopping them off as dead branches from the main body, leaving the State as full of life and power as before they were adopted. And it necessarily follows that the adequate exercise of the judicial power would not have involved the existence of the State, nor the rebuilding by judicial fiat of a new State Government, nor any assumption of executive or legislative powers under the Constitution.

Undoubtedly as a result of delay in the exercise of the judicial power the number of acts authorized by the amendments to be annulled or limited in force and effect by the courts will be largely increased and the serious nature of the situation be much intensified and aggravated. But this eventuality only shows the propriety and importance of early and decisive judicial action on behalf of litigants seeking to test the validity of legislative acts as in contravention of the Constitution. Moreover, it is well known that political

1. 223 U. S. 141-2.

demagogues are swarming over the country, and are competing with each other in efforts to captivate and capture, regardless of constitutional principles, the popular esteem; and to that end are devising and advocating still more radical and preposterous political nostrums, such as the recall of officers and judges and even of judicial decisions, by ballot at the polls. Sooner or later, then, unless these political impostures and popular delusions are checked, the court will find cases upon its calendar, brought up by writ of error or appeal, from the final decisions of a court, so called, of the people of a state, holding an act of Congress unconstitutional and void, or approving and upholding a local statute as valid, which is manifestly in contravention of the Federal Constitution; and this court cannot evade its judicial responsibility whether it hears and determines or dismisses the appeals. It could not dismiss them for lack of jurisdiction of the merits involved, as the judicial power to pass upon such questions has been exercised since the organization of the Government. The only remaining question would be whether the decisions from which the appeals were taken and sought to be reviewed, were made by a court of justice under a republican form of government. If, therefore, the appeals were dismissed, it would be necessary to so decide upon the sole ground that they were not judicial decisions, but were *coram non judice*.

The Chief Justice urgently maintains that there is a "settled distinction" "between judicial authority over justiciable controversies and legislative power as to purely political questions," but omits any reference to the constitutional provisions authorizing the court "in a controversy properly submitted, to enforce and uphold the applicable provisions of the Constitution as to each and every exercise of governmental power." This was a discreet omission in the opinion because there is no such distinction recognized or sanctioned in the organic law. On the contrary the extension of the ju-

dicial power in terms includes "all cases arising under this constitution;" and therefore necessarily applies, in the language of the Chief Justice, "to each and every exercise of governmental power," which is alleged to be in violation of the Constitution.

A controversy is justiciable where it involves the determination as to whether the acts reviewed are in conformity with or are repugnant to the Constitution. A political question becomes a judicial one when an inquiry is involved as to the power of the executive or legislature to do the act in question under the limitations of the Constitution. If the tax in question had been authorized by the State legislature there would have been no doubt of its conformity with the Constitutional provision concerning a republican form of government. But the tax was voted by a non-representative body of the people acting in their own behalf without legislative authority, and the question presented to the court for adjudication was whether such a tax was valid and enforceable, as within the guaranty of the fundamental law. The court declined to decide that question, on the assumption that the assault was made "not on the tax as a tax, but on the State as a State!" Was not this a palpable evasion of the real question before the court?

The Chief Justice overlooked or ignored the important case of *Texas v. White*,¹ which directly involved the question whether the reconstruction acts concerning the applicability and effect of the guaranty clause of the Constitution to a State Government were "absolutely controlling" upon the court; and it was held that they were not. Those acts, passed in 1867, declared that no legal government or adequate protection for life or property existed in Texas, and that it was necessary that peace and good order should be enforced

1. 7 Wallace, 700-1.

therein until a loyal and republican State Government could be legally established. Those acts accordingly created a military district of the States of Texas and Louisiana, with a military government over both States, endowed with authority to enforce its supremacy if needful through military commissions, until the States were entitled as provided in the acts to representation in Congress—a condition which had not been fulfilled in 1868, when this decision was made. Moreover the votes of those States had been rejected at every presidential election since the outset of the Civil War. The National legislature had therefore decided that Texas was not entitled to recognition as a loyal State with a republican form of government.

The court in a very able and exhaustive opinion of Chief Justice Chase, acknowledged that an existing government competent to represent the State in its relations with the National government was essential to entitle it to National recognition, and that such recognition is primarily an exercise of the legislative power. He added that

“no one has been bold enough to contend that, while Texas was controlled by a government hostile to the United States, and in affiliation with a hostile confederation, waging war upon the United States, senators chosen by her legislature, or representatives elected by her citizens, were entitled to seats in Congress; or that any suit instituted in her name could be entertained in this court. All admit that during the condition of civil war, the rights of the State as a member, and of her people as citizens of the Union, were suspended. * * * These new relations imposed new duties upon the United States. The first was that of suppressing the rebellion. The next was that of re-establishing the broken relations of the State with the Union. * * * For performance of the second duty or condition, authority was derived from the obligation of the United States to guarantee to every State in the Union a republican form of government. * * * In the exercise of the power conferred by the guaranty clause, as in the exercise of every other constitutional power, a discretion in

the choice of means is necessarily allowed. It is essential only that the means must be necessary and proper for carrying into execution the power conferred, through the restoration of the State to its constitutional relations, under a republican form of government, and that no acts be done and no authority exerted which is prohibited or unsanctioned by the Constitution. * * * Nothing in the case before us requires the court to pronounce judgment upon the constitutionality of any particular provision of these acts. But it is important to observe that these acts themselves show that the governments which had been established and had been in actual operation under executive direction were recognized by Congress as provisional, as existing, and as capable of continuance. * * * It suffices to say that the terms of the acts necessarily imply recognition of actual existing governments, and that in point of fact the governments thus recognized in some important respects still exist.”¹

The Court accordingly decided, notwithstanding the condemnation in the reconstruction acts of the State Government organized under a Constitution restoring the old relations of the State to the United States, and adopted by the people pursuant to the proclamation of the President, and despite the rejection of its senators and representatives from the halls of Congress, that the State of Texas was entitled to recognition as having an existing and republican form of government capable of enforcing its legal rights, and could therefore maintain an action in the National courts.

Three justices dissented from the decision upon the ground that the actual relationship of Texas to the United States was a “political fact” and not to be considered as a “legal fiction.” And they asked the following questions as conclusive of the matter:

“Is Texas a State, now represented by members chosen by the people of that State and received on the floor of Congress? Has

1. 7 Wallace, 727, 731.

she two senators to represent her as a State in the Senate of the United States? Has her voice been heard in the late election of President? Is she now held and governed as a conquered province by military force? The Act of Congress of March 2, 1867, declares Texas to be a 'rebel State,' and provides for its government until a legal and republican State government could be legally established." "The question is one in relation to which this court is bound by the action of the legislative department of the Government."¹

As this vigorous dissent is strictly in accordance with the *dictum* of Chief Justice Taney, and was overruled by the Court, it must follow that the *dictum* itself was also overruled.

It will be observed that the court in that case held that it was unnecessary to pass upon the constitutionality of the reconstruction acts, but still declined to yield assent to the declaration of Congress that the State Government was illegal or unauthorized by competent authority; and the court accordingly recognized it as an established, existing and republican form of Government, capable of continuance until changed by the people of the State. The decision ignored or overruled the action of Congress in its exercise of the legislative power, and therefore held in effect, notwithstanding the complaisant disavowal of the court, that such action was in contravention of the Constitution.

What is, within the meaning of the Constitution, a republican form of government? According to the accepted standard definition, it is a government in which the legislative power is delegated to the representatives of the people "as a duly constituted body of men in a State or Nation empowered under the Constitution to enact, amend or repeal the laws." And that this is the real interpretation to be given to the constitutional guaranty is evident from the fact that

1. 7 Wallace, 737-8, 741.

it is the only form of a republic embodied in the Constitution itself, as well as in the first constitutions of each and every of the thirteen original States composing the Union.

As stated by Chief Justice Waite in delivering the opinion of the court, in *Minor v. Happersett*¹ "the guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all the people participated to some extent, through their representatives, elected in the manner specially provided. These governments the Constitution did not change. They were accepted as they were, and it is, therefore, to be presumed that they were such as it was the duty of the States to provide. Thus we have unmistakeable evidence of what was republican in form, within the meaning of that term as employed in the Constitution."

1. 21 Wallace, 162, 175-6.

CASES CRITICIZED.

CASES CRITICIZED.

	PAGE
American Insurance Co. v. Cantor (1 Peters).....	137
Cunningham v. Macon R. Co. (109 U. S.).....	245
DeLima v. Bidwell (182 U. S.).....	153
Dorr v. U. S. (195 U. S.).....	185
Downes v. Bidwell (182 U. S.).....	125, 153
Durousseau v. U. S. (6 Cranch.).....	81, 138
Ex Parte McArdle (6 Wall.).....	11
Ex Parte McArdle (7 Wall.).....	11, 106
Ex Parte Yerger (8 Wall.).....	108
Electoral Commission of 1876.....	25
Fleming v. Page (9 How.).....	167
Georgia v. Stanton (6 Wall.).....	232, 257
Hans v. Louisiana (134 U. S.).....	222
Hawaii v. Mankichi (190 U. S.).....	175
Kansas v. U. S. (204 U. S.).....	236
Louisiana v. Jumel (107 U. S.).....	216
Martin v. Hunter's Lessee (1 Wheaton).....	91
Mississippi v. Johnson (4 Wall.).....	232, 257
McAllister v. U. S. (141 U. S.).....	145
Pacific Telephone Co. v. Oregon (223 U. S.).....	254
Scott v. Sanford (19 How.).....	16, 122
Wiscart v. D'Auchy (3 Dallas).....	87 Note

CASES CITED.

CASES CITED

A.

Abbottsford, The, 98 U. S. 440.
 Ableman v. Booth, 21 Howard, 520.
 Albright v. Sandoval, 200 U. S. 9
 American Construction Co. v. Jacksonville Ry., 148 U. S. 378.
 American Security Co. v. Dist. of Columbia, 224 U. S. 491.
 Atkins v. Disintegrating Co., 18 Wallace, 272.
 Ayres, In re, 123 U. S. 53.

B.

Baker v. People, 20 Johnson, 457.
 Baring v. Mercein, 5 Howard, 119.
 Benner v. Porter, 9 Howard, 235.
 Board of Liquidation v. McComb, 92 U. S. 531.
 Bollman, Ex parte, 4 Cranch, 75.
 Boom Co. v. Patterson, 98 U. S. 406.
 Boyd v. Thayer, 143 U. S. 135.
 Brown v. U. S., 171 U. S. 631.

C.

Callan v. Wilson, 127 U. S. 540.
 Carlisle v. U. S., 16 Wallace, 147.
 Carr v. U. S., 98 U. S. 433.
 Chapman v. U. S., 164 U. S. 436.
 Chappell v. U. S., 160 U. S. 499.
 Cherokee Nation v. Kansas R. Co., 135 U. S. 641.

Cherokee Tobacco, 11 Wallace, 616.
 Chisholm v. Georgia, 2 Dallas, 419.
 Christian v. Atlantic, etc., R. Co., 133 U. S. 233.
 Church of the Holy Trinity, In re, 143 U. S. 457.
 City of Panama (The), 101 U. S. 453.
 Clark v. Bazadone, 1 Cranch, 212.
 Clinton v. Englebrecht, 13 Wallace, 434.
 Cohens v. Virginia, 6 Wheaton, 379.
 Collen v. Wilson, 127 U. S. 540.
 Cross v. Burke, 146 U. S. 82.
 Cross v. Harrison, 16 Howard, 164.
 Cross v. U. S., 145 U. S. 82.

D.

Davis v. Gray, 16 Wallace, 203.
 DeGroot v. U. S., 5 Wallace, 431.
 Dodge v. Woolsey, 18 Howard, 331.
 Dooley v. U. S., 182 U. S. 222.
 Dowdell v. U. S., 221 U. S. 325.
 Duncan, In re, 139 U. S. 449.

E.

Emboy v. U. S., 100 U. S. 680.
 Ex parte Bollman, 4 Cranch, 75.
 Ex parte McCardle, 6 Wallace, 318.
 Ex parte Parks, 93 U. S. 18.
 Ex parte Siebold, 100 U. S. 371.
 Ex parte Tom Tong, 108 U. S. 556.
 Ex parte Wisner, 203 U. S. 455.

F.

- Farnsworth v. Montana, 129 U. S. 104.
 Fisher v. Baker, 203 U. S. 181.
 Florida v. Georgia, 17 How. 478.
 Fort Leavenworth R. Co. v. Lome, 114 U. S. 531.
 Fourteen Diamond Rings v. U. S., 183 U. S. 176.

G.

- Georgia v. Tennessee Copper Co., 206 U. S. 230.
 Gonzales v. Cunningham, 164 U. S. 612.
 Gordinier v. Village of Newburgh, 2 Johnson Ch. 162.
 Gordon v. U. S., 2 Wallace, 561; 117 U. S. 697.

H.

- Hagood v. Southern, 117 U. S. 53.
 Helke v. U. S., 217 U. S. 428.
 Hepburn v. Griswold, 8 Wallace, 603-4.
 Herndon v. Rock Island R. Co., 218 U. S. 135.
 Heydenfelt v. Dana Mining Co., 93 U. S. 634.
 Hill v. U. S., 9 Howard, 386.
 Hunt v. Palis, 4 Howard, 589.
 Hussey v. U. S., 222 U. S. 93.

I.

- Indiana v. Kentucky, 136 U. S. 479.
 Interstate Commerce Commission v. Brimson, 154 U. S. 447.
 Interstate Commerce Commission v. Baird, 194 U. S. 25.
 Interstate Commerce Commission v.

Humboldt Steamboat Co., 224 U. S. 474.

- In re Ayres, 123 U. S. 53.
 In re Church of the Holy Trinity, 143 U. S. 457.
 In re Duncan, 139 U. S. 449.
 In re Kain, 14 Howard, 120.
 In re Lemon, 150 U. S. 393.
 In re Louisville Underwriters, 134 U. S. 488.
 In re Schneider, 148 U. S. 157.
 In re Young, 209 U. S. 125.

J.

- Jarrot v. Jarrot, 7 Illinois,
 Juland v. Greenman, 110 U. S. 421.

K.

- Kain, In re, 14 Howard, 120.
 Kansas v. U. S., 204 U. S. 331.
 Kansas v. Colorado, 185 U. S. 208.
 Kaufman v. Lee, 106 U. S. 196.
 Kawanakos v. Polyblank, 205 U. S. 353.
 Kentucky v. Dennison, 24 Howard, 66.
 Kilbourne v. Thompson, 103 U. S. 108-9.
 Kohl v. U. S., 91 U. S. 367.
 Kurtz v. Moffitt, 115 U. S. 494.

L.

- LaAbra Mining Co. v. U. S., 175 U. S. 423.
 Langford v. U. S., 101 U. S. 341.
 Latham's and Deming's Appeal, 9 Wallace, 145.
 Lau Ou Bau v. U. S., 144 U. S. 47.
 Legal Tender Cases, 12 Wallace, 457.
 Lemmon v. People, 20 N. Y. 502.
 Lemon, In re, 150 U. S. 393.
 Little v. Barreme, 2 Cranch, 170.

Loughborough v. Blake, 5 Wheaton, 317.

Louisiana v. Mississippi, 202 U. S. 1.

Louisiana v. Texas, 176 U. S. 1.

Louisiana R. Co. v. Letson, 2 Howard, 551.

Louisville Trust Co. v. Knott, 191 U. S. 225.

Louisville Underwriters, In re, 134 U. S. 488.

Luther v. Borden, 7 Howard 1.

M.

Marbury v. Madison, 1 Cranch, 137.

Maryland v. West Virginia, 217 U. S. 1, 517.

McCulloch v. Maryland, 4 Wheaton, 316.

McPherson v. Bleeker, 146 U. S. 23.

Minor v. Happersett, 21 Wallace, 175.

Missouri v. Illinois, 180 U. S. 208.

Missouri v. Illinois, 185 U. S. 142.

Missouri v. Illinois, 200 U. S. 518.

Missouri v. Illinois, 206 U. S. 47.

Missouri v. Iowa, 7 Howard, 660.

Missouri, etc., R. Co. v. Missouri Commissioners, 183 U. S. 59.

Murray v. Wilson Distilling Co., 213 U. S. 151.

Muskat v. U. S., 219 U. S. 346.

N.

Naganab v. Hitchcock, 202 U. S. 473.

New v. Oklahoma, 195 U. S. 252.

North Carolina v. Temple, 134 U. S. 22.

Norwalk Street Co.'s Appeal, 69 Conn. 576.

O.

Oregon v. Hitchcock, 202 U. S. 60.

Osborne v. U. S., 9 Wheaton, 819.

P.

Page v. Burnstine, 102 U. S. 664.

Panama, The City of, 101 U. S. 453.

Parks, Ex parte, 93 U. S. 18.

Parsons v. Bedford, 3 Peters, 445.

Pennsylvania v. Wheeling Bridge Co., 13 Howard, 518.

People v. Foot, 19 Johnson, 57.

People v. Goodwin, 18 Johnson, 187.

People v. Utica Insurance Co., 15 Johnson, 358.

R.

Rassmussen v. U. S., 197 U. S. 516.

Raguete Habana, The, 175 U. S. 677.

Reynolds v. U. S., 98 U. S. 145.

Rhode Island v. Massachusetts, 12 Peters, 692.

Rhode Island v. Massachusetts, 15 Peters, 233; 4 Howard, 640.

Ryan v. U. S., 136 U. S. 68.

S.

Schaumborg v. U. S., 103 U. S. 667.

Schneider, In re, 148 U. S. 157.

Shepperd v. Graves, 14 Howard, 505.

Siebold, Ex parte, 100 U. S. 371.

Sinclair v. District of Columbia, 192 U. S. 16.

Sinking Fund Cases, 99 U. S. 61.

Siren, The, 7 Wallace, 153.

Smith v. Reeves, 178 U. S. 436.

Smyth v. Ames, 169 U. S. 466.

Smythe v. Fisk, 23 Wallace, 374.

South Carolina v. North Carolina, 192 U. S. 286.

South Carolina v. U. S., 199 U. S. 448.

Spencer's Appeal, 78 Conn. 301.

Springville v. Thomas, 166 U. S. 707.

Standard Oil Co. v. U. S., 221 U. S. 1.

St. Louis, etc., R. Co. v. Taylor, 210 U. S. 281.

T.

Taylor v. Beckham, 178 U. S. 548.
 Tennessee v. Davis, 100 U. S. 258.
 Texas v. White, 7 Wallace, 700.
 Thompson v. Utah, 170 U. S. 343.
 Tindal v. Wesley, 167 U. S. 204.
 Tom Tong, Ex parte, 108 U. S. 556.
 The Abbottsford, 98 U. S. 440.
 The Cherokee Tobacco, 11 Wallace, 616.
 The City of Panama, 101 U. S. 453.
 The Francis Wright, 105 U. S. 381.
 The Raguete Habana, 175 U. S. 677.
 The Siren, 7 Wallace, 153.

U.

United States v. Circuit Judges, 3 Wallace, 673.
 United States v. Duell, 172 U. S. 576.
 United States v. Eckford, 6 Wallace, 484.
 United States v. Freight Association, 166 U. S. 290.
 United States v. Gettysburgh El. R. Co., 160 U. S. 668.
 United States v. Great Falls Mfg. Co., 112 U. S. 645.
 United States v. Hudson, 7 Cranch, 33.
 United States v. Joint Traffic Association, 171 U. S. 505.
 United States v. Jones, 109 U. S. 513.
 United States v. Jones, 119 U. S. 477.
 United States v. Kirby, 7 Wallace, 482.
 United States v. Lynch, 188 U. S. 445.

United States v. Michigan, 190 U. S. 396.
 United States v. Moore, 3 Cranch, 159.
 United States v. O'Keefe, 11 Wallace, 178.
 United States v. Rider, 163 U. S. 132.
 United States v. Texas, 143 U. S. 621.
 United States v. Young, 94 U. S. 259.

V.

Van Brocklin v. Tennessee, 117 U. S. 154.
 Virginia v. Tennessee, 148 U. S. 503.
 Virginia v. West Virginia, 11 Wallace, 39.

W.

Webster v. Reid, 11 Howard, 437.
 Western Union Tel. Co. v. Andrews, 216 U. S. 165.
 White v. Hart, 13 Wallace, 646.
 Wilson v. North Carolina, 169 U. S. 556.
 Wisconsin v. Pelican Insurance Co., 127 U. S. 287.
 Wisner, Ex parte, 203 U. S. 455.
 Wolf v. New Orleans, 103 U. S. 358.
 Worcester v. Georgia, 6 Peters, 515.
 Wyaman v. Southard, 10 Wheaton, 46.

Y.

Young, In re, 209 U. S. 125.

Z.

Zorfield v. Goldsby, 211 U. S. 249.

INDEX.

INDEX.

- Actions** or suit, when may not be brought against the United States or against a State, 208-209, 225; State should always be made a party when not prohibited, but when it cannot, may be brought without consent against the State officer, 209-211; various modifications of rule in later decisions requiring all of the parties in interest to be made parties, where the State claims an interest and can not be brought in since 11th constitutional amendment, 211-216; in still later cases a technical distinction is made, that a suit by a State officer to enforce a statute void as unconstitutional, may be enjoined on the ground that State has no interest therein, 223-224; true ground of reconciliation between decisions, is that the State is not affected or concluded unless it is in fact a party to the action, 224; ordinary rule can not be sustained upon any sound principle, 227-229; origin of rule in this country traceable to publicists, 229-232; publicists not agreed however, 230-231; reasons given for rule not applicable to a republic, 231-234, 238; constitution the only real test, 229-230, 233-234; singular distinction concerning non-suability of United States and the State, as two sovereignties, 235-236; new reason for rule that there can be no legal right against the maker of the law, 237; rule recently extended to a Territory, 237; which would exempt a city or a village from prosecution for acts within its municipal jurisdiction, 237; rule in England a formality, but to all essential purposes a right, 239; rule now regulated in England in that sense by statute, 240-241; rule substantially the same in Prussia and Spain, 239; and also in Austria, 230.
- Ambiguities**, no patent, or latent, in the Orleans Territorial Act, 86-90.
- American Ins. Co. v. Cantor**, held in Circuit Court that constitution and laws did not by act of cession from Spain take effect in Florida, 137-138; nor by terms of organic Territorial act were its courts vested with same powers as those of Kentucky district, 137-138; decision affirmed on appeal on another ground, that constitution only applied to courts within the States, 139; held that four years tenure of judges in a territory vested with federal judicial power valid, 139; constitutional question not involved, 139-140; also held that citizens living in Territories could not appeal to judicial power of constitution, as Territorial courts were incapable of receiving it, 140-141; decision inconsistent with case of *Loughborough v. Blake*, 141-142.

- Chase, Chief Justice, a great statesman and worthy successor of Marshall and Taney, 53-54.
- Chisholm v. Georgia, 244-250; opinion of Justice Wilson, 244-247; opinion of Chief Justice Jay, 247-249; opinions embody the true rule of State and National suability, and announce proper interpretation of constitution; controlling motive in adoption of 11th amendment was to escape liability by the States upon debts owing in England contracted prior to Revolution, 250-251.
- Congress, authorized only to make exceptions to appellate jurisdiction of the court, 79-80; no exceptions contained in old judiciary act or any statute relating to Orleans court, 82-84; in organizing Territories, followed precedent of old confederation in Northwest Territory, 127-128; that Territory necessarily organized by compact, 127-128; in organizing Territories, failed to recognize effect of later provisions of constitution, 128; assumed it was under no more restraint in respect to Territories than the old confederation, 128; accordingly ignored or excluded the court as a co-ordinate department of government from the Territories, 128; government is triune and can not act except in its trinal nature, 129; power of, in admission of States and admission or rejection of senators and representatives to their seats 255-256.
- Constitution, is sole and only source of all governmental power, 126; immanent in all national territory as well as in the States, 129, 188-189; not been formally extended to all Territories, 130-131; nor to all new States, 130; distinction recognized in this respect between original and newly acquired territory, 131-132; no uniform rule established by Congress as to extension of, 132-133, 134; accordingly deemed desirable in 1874 to enact general statute which only partially covered earlier omissions, 134; rule of interpretation of provisions of, 207-208.
- Cross v. Harrison, revenue laws of United States took effect *ipso facto* in California upon ratifications of treaty with Mexico, 123-124; same rule recognized and enforced as to Porto Rico in Dooley v. United States, 170.
- Cunningham v. Macon, etc., R. Co., 208-209; action against governor as party to contract and to former action by him to foreclose rights of parties under contract, 209-210, 212; comparison of case with Kaufman v. Lee, 210-214; result of these and other decisions is no uniform rule when the State is to be considered party to the suit, 213-216; unconscionable outcome of the decisions, 216.
- De Lima v. Bidwell, 153-156; duties under general tariff act could not be imposed upon importations from Porto Rico to New York after ratifications of treaty of peace, 153-154; Porto Rico was not a foreign country after we acquired possession under the treaty, 154-156; Justice White and three other justices dissented, 156; Justice White's dissenting opinion became concurring opinion in Downes case, 156.
- Downes v. Bidwell, 156-157; duties under special tariff or Foraker act properly imposed, as constitution had not been extended by Congress

to the island, 154, 156-157; revenue clauses of the constitution did not extend of their own inherent force to the island, 156-157; held while all new territory is acquired by virtue of Constitution, it passes *instantly* under absolute dominion of Congress, 158; according to Justice Brown, "certain principles of natural justice inherent in Anglo-Saxon character" were sufficient protection to inhabitants of Territories, 157; according to Justice White, Porto Rico had not been incorporated into and become an integral part of the United States, 159-167; Justice White reached his conclusion assuming that affirmative provisions of constitution were not in force in Territories until their incorporation into the Union, 159; but as pointed out by him even after incorporation of a territory "the judge presiding over a jury need not have constitutional tenure, yet the jury must be organized in accordance with the constitution," 160; he also assumed that absolute power over the Territories followed from their acquisition under international law, 161; but when title is acquired to the territory it is only subject with its master to the law of the constitution, 162-163; further suggestion that unless Congress has absolute dominion it can not hold any part of territory for any beneficial use or purpose, is devoid of foundation in law or fact, 163-164; fundamental error of Justice White's opinion is that the treaty power may impose conditions preventing the constitution from taking effect in newly acquired territory, or limiting its effect therein, 164-166; Chief

Justice and three of his associates dissented from decision, 171-174; five different opinions in the case, but "no opinion in which a majority of the court concurred," 174.

Durousseau v. United States, 85-91, 102-103; opinion of Chief Justice Marshall obiter and plain judicial legislation, 90; reasons untenable, and not allowed to influence decision of *Clark v. Bazadone*, 90-91; but this opinion recognized and enforced in all subsequent cases, 96-97; held in substance that appeal could only be sustained under old judiciary act, 102-103; although not mentioned or referred to in that act, 102-103, 135-136; dignity and independence of the court surrendered to the other departments, 101-102.

Electoral Commission of 1876, 25; composition of, 25; nature of controversy, 26-30; given same powers as the two houses of Congress over electoral votes, 28-29; rulings of commission, 26-27, 36-37; power to ascertain genuine votes in order to count correctly, 30-33; Lincoln's opinion, 33-34; power to count under constitution, a self executing provision, 40-41; Congress authorized same method of counting in prior elections, 33-34; statute enacted to same effect in 1887, and still in force, 35; comparison of opinions of judges concurring in decision of commission with their opinions in legal tender cases, 42-44.

Executive, should not be vested with power of selecting judges, 48-49; or should be limited in selection of names to those suggested by lower house of Congress, 63.

Ex parte McArdle, 106-107.

- Ex parte Yerger**, 108-110; jurisdiction maintained under first judiciary act to review habeas corpus proceedings, 108-109.
- Federal Laws**, may be local or general, and if the latter, are in force in all national territory, 29, 144.
- Fleming v. Page**, 167-169; stress laid upon, in *De Lima and Downes* cases, 167; that case has no application to Porto Rican cases, as the question there arose while Tampico was in temporary occupation during the Mexican war of American army, 167-168; cause of action there arose while the war was in progress, and occupation was a war measure, 168; case was decided in 1850 and executive measures referred to in *Cross v. Harrison* had not then been published, and Chief Justice Taney labored under a misapprehension when he said that in no instance had a place been recognized as domestic territory for the purpose of trade unless previously authorized by act of Congress, 169-170; proper rule recognized and enforced in *Dooley* case decided at same time as *De Lima and Downes* cases, holding goods consigned to Porto Rico before ratifications of treaty, collectible under war power, but those consigned afterward not collectible, 170.
- Georgia v. Tennessee Copper Co.**, 198-203.
- ***Habeas Corpus**, and other common law writs included in appellate jurisdiction conferred on the court by judiciary acts and other statutes, 104-107, 116-117; court held its appellate power applied to a case arising upon an arrest under reconstruction acts, and heard the merits, 106-107; Congress repealed the act before decision of the merits and court then held it had lost jurisdiction, and dismissed appeal, 107; jurisdiction might have been retained under first judiciary act, as held in a later case, 108-109; right to the writ is guaranteed by the constitution and Congress can not suspend it except in a case of rebellion or invasion, 111-112.
- Hawaii v. Mankichi**, a case of flagrant judicial legislation, 176-184; formal transfer of sovereignty to United States completed in August, 1898, 176-178; all existing legislation not contrary to the constitution of United States retained in force, 177; in 1899 Mankichi was tried and convicted in a Hawaiian court, of manslaughter, without an indictment by a grand jury by a verdict of only nine of twelve persons composing petit jury, 178; decision was affirmed by Supreme Court, four justices dissenting, 178-179; authorities cited in opinion of majority afford no countenance or support to its reasons, 179-185; real ground of decision that constitutional guarantees relating to grand and petit juries did not confer fundamental rights, 185-186; upon authority of this case a similar decision was subsequently rendered extending same rule to the Philippines, 186.
- Impeachment**, unjustifiable proceeding against President Johnson, 22-24; executive refused in one instance to execute decision of court, 12; an exception to judicial power, 65.
- International Law**, a part of our municipal law, 126; not a part of constitutional law.
- Judges**, appointment of, 3; **partisan**

motives usual in their selection, 45-48, 56; should not accept diplomatic appointment, 56-60; may properly act as arbitrators, 59; should be chosen directly or indirectly by the people at elections, or selected by president limited to names suggested by lower house of Congress, 61-63; in Territories have been removed arbitrarily like ordinary civil officers, 147.

Judicial Code of 1911 superseded act of 1891, 115; no material change of appellate power of court, 115; two new courts created, Commerce Court and Court of Customs Appeals, 115; Circuit Court abolished, and District Court made great court of original jurisdiction in the States, 115.

Judicial Power, extended by constitution to enable court to act as a check upon other departments, 64, 126-127; divided into original and appellate jurisdiction, 78; appellate power subject to exceptions by Congress, 78-79; such exceptions merely of unimportant part of power, to enable court to perform its functions as last resort, 79-80, 119; original and supreme authority of, is the constitution, 74, 84, 119, 134; distinction between, and legislative power, 70-77; original and appellate, vests in the court automatically, 95, 97-98, 124-125; co-extensive with the national domain, 120; as extended, includes all constitutional questions arising from acts of a governmental character, which are justiciable, 191-192; criterion is not whether act is political, but justiciable, 192-193; all political or governmental acts resulting in injury to individuals

are justiciable when the inquiry is whether it is not in violation of the constitution, 192-196; includes all questions in litigation arising under the guaranty to the States of a republican form of government, 252, 263-266; meaning of guaranty is a judicial question, 256.

Judiciary Act of 1789, provisions of, 80-81; interpretation of, by Chief Justice Marshall in *Durrosseau* case, 81-82; interpretation in that case a dictum, 82-84; no provision in, or in any other statute, relating to appeal from Orleans court, 82-84; reasons for dictum untenable, 85-87; interpretation of, practically stripped the court of all appellate jurisdiction except as conferred by statute, 98; limited review given in, to Supreme Court limited to civil actions involving stated amounts, 99-100; superseded by new judicial act in 1891, 113; singular omission in original act creating Court of Claims to authorize power to decide cases subject only to appeal, 117-118; courts accordingly refused to entertain appeals from opinions merely advisory to executive or Congress, 117-118; act was then amended conferring judicial power, 118.

Judiciary Act of 1891, superseded act of 1789, 113; practically restored within the States appellate jurisdiction conferred by the constitution, 113; created Circuit Courts of Appeals, 113; special leave may be given to review any decisions of this intermediate court, 113; did not in terms refer to appeals from Territorial courts or those of the District of Columbia, 113; court refused to entertain such appeals un-

der general act, and as before they are only heard under special acts, 113-114; superseded in 1811 by judicial code, 115.

Juries, grand and petit, are guaranteed to all persons by the constitution, 184-185; these guaranties are enforced in the Territories and District of Columbia, 152-153, 185, 187-188.

Jurisdiction of Court, co-extensive with national domain, 120, 129-130; clearly prevailed in original territory of the Union, north of Ohio River and east of the Mississippi River, excepting Florida, 120-121; same rule should prevail in new territory acquired from other governments, 121-124; this view received sanction of court and executive, 122-124; has been followed by Congress in nearly all continental Territories acquired by conquest or purchase, 136-137; new policy adopted as to territory inhabited by alien races, 137; extends to all questions of a justiciable nature, 191-196; including disputed boundary lines between States involving only questions of sovereignty, 194-195; and actions to abate nuisances by one State as *parens patrie* against another State or corporation, 197-199, 203; and to prohibit excessive appropriation of water in a navigable river to the injury of persons in another State, 198, 200-202; political questions may become judicial ones, 203-204; all governmental acts become subject to judicial cognizance when charged by a competent party to be in violation of the constitution, 204-206; even a State may be prosecuted as a party for such a violation, 219-

221; the 11th amendment has no application where a suit is brought against a State by one of its own citizens, 222-223; great injustice results from the rule that the United States or a State can not be sued, 226; exemption from liability has been extended to cases in which the United States was plaintiff and beaten on the merits, 227; has been admitted that the rule of nonsuability can not be sustained on any principle applicable to a republican form of government, 227-229, 231-234, 238; exemption of president from legal process an "amazing judicial conclusion," 241-243; not consistent with decision of Marshall in case of Aaron Burr, 243; nor with decision in *Chisholm v. Georgia*, 244-250.

Kaufman v. Lee, 210-211; effort in opinion to distinguish, from Cunningham case, as an action of tort, 210; action brought under the law of Virginia, where ejectment was a substitute for the old remedy of writ of right, 211; action was therefore to determine merely true title, 211-212; comparison of, with Cunningham case, 210-214; under decisions no uniform rule established when the State is to be considered a party in interest, 213-216; unconscionable result of the decisions, 216.

Legal tender decisions, 5, 7-9, 41-43; original decision overruled by dictation of Congress, 9-10.

Legislation of 1801, reorganizing court and creating other inferior courts censurable, 13-14; act of Congress repealing former legislation to prevent decision of court reprehensible, 11; no legislation

- creating exceptions to appellate power from Orleans Court, 82-84; Congress may legislate in general or special or even local terms in its discretion, 144.
- Loughborough v. Blake**, territories in District of Columbia not less within the United States than Maryland or Pennsylvania, and subject to direct taxation, 142.
- Louisiana v. Jumel**, contracts incorporated in a statute and in the State constitution repudiated by the State and held not enforceable against it, 217-219; neither State officers nor the State could be prosecuted without consent, as the latter was immune as a party despite interdictions of constitution, 219; views of Chief Justice Marshall to the contrary, 219-221; who held 11th amendment did not operate as an exception to this jurisdiction, 220-221.
- Luther v. Borden**, no federal question involved, 252-253; involved legitimacy of two contending State governments, 253; had been decided by the State court, which was conclusive upon the federal courts, 253; Supreme Court can not determine a State government has been established which the State courts disown and repudiate, 253; remarks of Chief Justice Taney and Chief Justice Fuller in cases cited in Oregon case were mere judicial dicta, 254-255; neither president nor Congress had taken any action concerning the controversy in Rhode Island, 254; question not before the court whether president or Congress could intervene in that controversy, 254.
- McAllister v. United States**, 145-146; held Territorial judge was an ordinary civil officer and subject to arbitrary removal, 147; conclusion reached on assumption that Territories were subject to plenary power of Congress, 148; three judges dissented, 148-149; author of opinion of the court fourteen years later delivered opinion in *Rasmussen* case irreconcilable with this decision, 150-152.
- Marshall's** great services as expounder of the constitution, 50-51.
- Martin v. Hunter's lessee**, 91-95; opinion by Story that constitution is mandatory upon Congress to vest whole judicial power in Supreme and Inferior Courts, 92-93; including all cases arising under constitution, 93; this view would result in governmental deadlock if Congress refuse or omit to do so, 94; proper interpretation is that power vests automatically in judicial as in executive and legislative departments, 95; general rule of interpretation of the constitution, 207.
- Missouri v. Illinois**, right to enjoin a nuisance maintained in behalf of inhabitants, 197-199.
- Orleans territory**, organization of, 85-93, 102-103; court of, created by a special act in which no provision was made for an appeal, 135-136; in all later Territorial acts special provision made for appeals, 136.
- Pacific Telephone Co. v. Oregon**, decision founded upon prior dicta, without original investigation, that guaranty of republican form of government is a political question exclusively committed to Congress, and can not be questioned by the judiciary, 254; opinion assumed

- subsisting difficulties that did not exist, as that adoption of initiative and referendum destroyed all government republican in form in Oregon, so that not only the particular statute but every other statute passed in Oregon since their adoption was involved in the decision, also that every citizen might assail in a court of justice the rightful existence of the State, and thus impose upon the court the duty of building up a new government upon the ruins of the old one, 259-261; court can not in this manner evade its constitutional duty as new appeals will come before it which will necessarily involve the merits of the controversy whether the appeals are entertained or dismissed, 262; what is a republican form of government under the constitution, 266-267.
- Philippines**, in organization of, president given absolute power, 131; general statute of 1878 excepted from, 189-190.
- Rasmussen v. United States**, a jury in Alaska must be a constitutional jury, 152-153.
- Rhode Island v. Massachusetts**, 195-196; involved merely a question of State sovereignty, 194; authority of this case now unquestioned, 197.
- Senate**, *ex parte* condemnation of President Jackson unjustifiable, 15-16; partisanship a predominant influence in its proceedings, 21-22; even judicial action of, biased by political prejudice, 22-24.
- Supreme Court**, origin of, and method of organization, 1-6; final re-organization, 7; action of, coerced by Congress, 10-11; decision in *Dred Scott* case example of subservience to political projects, 16-20; should be permanently organized in constitution, 61; judicial power as extended vested in automatically, 64, 95; exception created by 11th amendment of constitution, 65-66; process of impeachment an exception, 65; no earlier precedent of such an extensive judicial power, 67; court final arbiter of all constitutional questions, 68-73, 119; appellate power limited by old judiciary act to cases mentioned therein, 99-100; jurisdiction extends to all questions of justiciable nature, 191-196; including political action of State authorities, in violation of constitution, 257-259, 262-263.
- Taney**, a great judge and powerful reasoner in all branches of the law, 51-52.
- Territorial Governments**, executive and Congress have usurped and maintained absolute power over, 130; in many instances constitution and laws were formally extended by Congress to, 130; in many other instances no such extension was made, 130; a Territorial court is a court of the United States, 149; and a jury in that court must be a constitutional jury, 149; same rule applies to a jury in District of Columbia, 149.
- Wiscart v. D'Auchy**, 87-89 note; opinions contradictory and obiter, 87-89.

